

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 62

FEDERAL TRADE COMMISSION, PETITIONER

vs.

COLGATE-PALMOLIVE COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIRST CIRCUIT

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Original Print

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1  
[fol. A]

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

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**No. 6145**

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**COLGATE-PALMOLIVE COMPANY, PETITIONER**

**v.**

**FEDERAL TRADE COMMISSION, RESPONDENT**

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**No. 6146**

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**TED BATES & COMPANY, INC., PETITIONER**

**v.**

**FEDERAL TRADE COMMISSION, RESPONDENT**

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**PETITIONERS' CONSOLIDATED RECORD APPENDIX  
AND PROCEEDINGS IN SAID CAUSE TO AND  
INCLUDING MARCH 31, 1964**

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[fol. 1]

## RELEVANT DOCKET ENTRIES.

1961

Dec. 29—Issuance of Order and Opinion of Federal Trade Commission

1962

Nov. 20—Issuance of Decree and Opinion of Court of Appeals for the First Circuit in Nos. 5972 and 5986

1963

Feb. 18—Issuance of Proposed Order and Second Opinion of Federal Trade Commission

Mar. 18—Filing of Motion by Colgate-Palmolive Company for extension of time for filing exceptions; and

Filing of Motion by Ted Bates & Company, Inc. for extension of time for filing exceptions

Mar. 20—Issuance of Order extending time of respondents to file exceptions

Apr. 15—Filing of Exceptions by Colgate-Palmolive Company to Proposed Order; and

Filing of Exceptions by Ted Bates & Company, Inc. to Proposed Order

Apr. 25—Filing of Statement by complaint counsel

May 7—Issuance of Third Order and Memorandum of Federal Trade Commission

June 6—Filing in this Court of Petition by Colgate-Palmolive Company to Correct, Review and Set Aside Order of the Federal Trade Commission; and

Filing in this Court of Petition by Ted Bates & Company, Inc. for Review and to Correct Order of Federal Trade Commission; and

[fol. 2]

Filing of Motion by Colgate-Palmolive Company to Federal Trade Commission requesting Commission to correct its Order; and

Filing of Motion by Ted Bates & Company, Inc. to Federal Trade Commission requesting Commission to correct its Order

1963

June 11—Issuance of Order of Federal Trade Commission denying respondents' motions to correct its Order; and

Issuance of Orders of the Court granting leave to petitioners to consolidate memorando on motions in Nos. 6147 and 6148 with briefs in these proceedings

July 16—Certified transcript of record forwarded by Federal Trade Commission to this Court; and Notice given by Clerk of this Court as to time within which to file designation of record and filing of briefs and appendix

July 23—Filing of Petitioners' Statement of Points and Designation of Parts of Record to be Printed Joint motion to consolidate appeals, permit respondent to file consolidated brief and to extend time for filing of briefs.

July 25—Issuance of order granting joint motion filed July 23

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[fol. 3]

BEFORE

FEDERAL TRADE COMMISSION

Commissioners:

PAUL RAND DIXON, Chairman  
SIGURD ANDERSON  
WILLIAM C. KERN  
PHILIP ELMAN  
EVERETTE MACINTYRE

FIRST ORDER AND OPINION OF COMMISSION—issued  
December 29, 1961

In addition to the findings of fact and conclusions stated in its opinion, the Commission adopts the following:

FINDINGS OF FACT

1. Respondent Colgate-Palmolive Company is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 300 Park Avenue, New York, New York.

2. Respondent Ted Bates & Company, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 666 Fifth Avenue, New York, New York.

3. Respondent Colgate-Palmolive Company is now, and for some time last past has been, engaged in the manufacture, advertising, offering for sale, sale, and distribution of a shaving cream designated "Palmolive Rapid Shave," [fol. 4] and various other products, to distributors and to retailers for resale to the public.

4. In the course and conduct of its business, respondent Colgate-Palmolive Company now causes, and for some time last past has caused, its "Palmolive Rapid Shave" when sold, to be shipped from its factories or plants in the various states of the United States to purchasers located in various other states of the United States and in the

District of Columbia, and maintains, and at all times relevant has maintained a substantial course of trade in "Palmolive Rapid Shave," in commerce as "commerce" is defined in the Federal Trade Commission Act.

5. In the course and conduct of its business, at all times relevant, respondent Colgate-Palmolive Company has been in substantial competition in commerce with corporations, firms, and individuals in the sale of shaving cream.

6. Respondent Ted Bates & Company, Inc., is now, and for some time last past has been, an advertising agency of respondent Colgate-Palmolive Company, and now prepares and places, and for some time last past has prepared and placed, for publication, advertising material, including television commercials but not limited to those described below, to promote the sale of "Palmolive Rapid Shave" and other products.

7. On behalf of respondent Colgate-Palmolive Company, respondent Ted Bates & Company, Inc., originated, prepared, and placed, for showing over national network television, television commercials dealing with "Palmolive Rapid Shave," which commercials were shown over a nationwide television network during the latter part of 1959, and also over a number of local television stations throughout the United States, in connection with the advertising, offering for sale, sale, and distribution of "Palmolive Rapid Shave" in commerce.

[fol. 5] 8. Respondents, by means of these television commercials have represented, directly or by implication that the "moisturizing" action of "Palmolive Rapid Shave" is such that by application of that product to the surface of very coarse, dry sandpaper it is possible immediately thereafter to shave off the rough surface of the sandpaper with a single stroke, and that this demonstration proves the "moisturizing" properties of "Palmolive Rapid Shave."

9. What was represented to be sandpaper in these television commercials was in reality a "mock-up" composed of plexiglass to which sand had been applied, especially made for use in the demonstrations depicted in these commercials, and was not in fact sandpaper.

10. The visual appearance of the purported sandpaper, which was actually a "mock-up," as well as the accom-



panying commentary, in these "Palmolive Rapid Shave" commercials create the impression that the viewer is observing the shaving of a very coarsely textured sandpaper, most closely resembling the type of sandpaper commonly denominated "extra coarse."

11. These commercials clearly convey the impression that very coarse pieces of sandpaper are actually being shaved with a single stroke, during the demonstrations depicted, immediately after application of "Palmolive Rapid Shave" to their dry surfaces.

12. Sandpaper of the variety apparently depicted in these commercials cannot successfully be shaved immediately after application of "Palmolive Rapid Shave" to its surface, even with a number of strokes under heavy pressure; sand paper of the variety apparently depicted in these commercials cannot successfully be shaved within one to three minutes after application of "Palmolive Rapid Shave;" even with a number of strokes under heavy [fol. 6] pressure; no piece of sandpaper of the variety apparently depicted in these commercials that appears in the record has been shaved genuinely clean, as the television "mock-up" was, regardless of the interval allowed after application of "Palmolive Rapid Shave;" one reason why real sandpaper was not used in the "Palmolive Rapid Shave" commercials was that it required too long a soaking period before effective shaving was possible.

### CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

2. The television commercials described above are false, misleading, and deceptive, within the meaning of the Federal Trade Commission Act, in that they represent that the "moisturizing" properties of "Palmolive Rapid Shave" are such that it is possible immediately after application of "Palmolive Rapid Shave" to very coarse, dry sandpaper to shave off the rough surface of that sandpaper with a single stroke, when this is not in fact possible, and that sandpaper of the variety depicted is actually being shaved in the manner depicted in the televised demonstra-

tions, when in reality the thing being shaved is a "mock-up" composed of plexiglass to which sand has been applied, especially made for use in the demonstrations depicted in these commercials.

3. The use by respondents of the aforesaid false, misleading, and deceptive representations has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that those representations were and are true, and into the purchase of substantial quantities of "Palmolive Rapid Shave" by reason of such erroneous and mistaken belief. As a consequence, substantial trade in commerce [fol. 7] has been, and may be, unfairly diverted to respondent Colgate-Palmolive Company from its competitors, and substantial injury has thereby been done, and may be done, to competition in commerce.

4. The aforesaid acts and practices of the respondents have been, and may be, to the prejudice and injury of the public and of respondent Colgate-Palmolive's competitors, and constituted, and continue to constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

5. In the discharge of the Commission's obligation to preserve competition and protect the public against false, deceptive, or unfair advertising practices of the type here found to be unlawful, it is necessary to prohibit respondents, in advertising not only "Palmolive Rapid Shave" but any other product, from further use of representations, by pictures, depictions, or demonstrations, either alone or accompanied by oral or written statements, that do not genuinely represent what they purport to represent and do not prove what they purport to prove about the quality or merits of a product.

In accordance with its findings of fact, opinion, and conclusions of law, the Commission hereby promulgates the following:

#### FINAL ORDER.

IT IS ORDERED that respondents Colgate-Palmolive Company, a corporation, and its officers, and Ted Bates &

Company, Inc., a corporation, and its officers, and the agents, representatives, and employees of respondents, directly or through any corporate or other device, in the advertising, offering for sale, sale, or distribution of shaving cream or any other product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, [fol. 8] do forthwith cease and desist from:

Representing, directly or by implication, in describing, explaining, or purporting to prove the quality or merits of any product, that pictures, depictions, or demonstrations, either alone or accompanied by oral or written statements, are genuine or accurate representations, depictions, or demonstrations of, or prove the quality or merits of, any product, when such pictures, depictions, or demonstrations are not in fact genuine or accurate representations, depictions, or demonstrations of, or do not prove the quality or merits of, any such product.

AND FURTHER, in the advertising, offering for sale, sale, or distribution of "Palmolive Rapid Shave," or any other shaving cream, in commerce, as "commerce" is defined in the Federal Trade Commission Act, from:

Misrepresenting, in any manner, directly or by implication, the quality or merits of any such product.

IT IS FURTHER ORDERED that respondents, Colgate-Palmolive Company and Ted Bates & Company, Inc., shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

By the Commission.

[SEAL]

JOSEPH W. SHEA  
JOSEPH W. SHEA  
Secretary.

[fol. 9] Attached is opinion of the Commission by Commissioner Elman.

# OPINION OF THE COMMISSION.

By Commissioner Elman:

This is an appeal from the hearing examiner's initial decision dismissing a complaint charging respondents Colgate-Palmolive Company and Ted Bates & Company, Inc., with having violated Section 5 of the Federal Trade Commission Act<sup>1</sup> by using false, misleading, and deceptive television commercials in advertising Colgate-Palmolive's shaving cream, "Rapid Shave."

We hold that the initial decision was erroneous; that the allegations of fact in the complaint have been fully substantiated; that respondents, by using these commercials, engaged in unfair and deceptive acts and practices, and unfair methods of competition, in interstate commerce, in violation of Section 5; and that, to protect the public against recurrence of such unlawful conduct, an appropriate cease and desist order should be entered against both respondents.

## I.

Respondent Colgate-Palmolive Company makes and sells a shaving cream called "Rapid Shave." Respondent Ted Bates & Company, Inc., is an advertising agency which prepared and placed for publication the three 60-second television commercials advertising "Rapid Shave" which are involved in this proceeding. These commercials were presented on programs sponsored by Colgate-Palmolive that were broadcast on a national network in the latter part of 1959. The scripts of these commercials, detailing their "video" and "audio" content, appear as [fol. 10] exhibits in the record. In addition, the films of the commercials, as actually broadcast, were shown to the Commission during the oral argument of the appeal.

The first of these (Commission Exhibit 2, entitled "Sandpaper Mask—Gifford") opens by showing a foot-

<sup>1</sup> 38 Stat. 719, as amended, 15 U. S. C. § 46.

ball being place-kicked, with the ball zooming toward the viewer. The picture then "cuts" to a football player whose face is hidden behind a mask that appears to be made of coarse, gritty sandpaper. The voice of an unseen announcer asks: "Who is the man behind the sandpaper mask?" The football player strips off the sandpaper mask, revealing a heavy growth of whiskers. As the player rubs his cheek ruefully, the announcer says: "It's triple-threat man, Frank Gifford—backfield sensation of the New York Giants . . . a man with a problem just like yours . . . a beard as tough as sandpaper . . . a beard that needs . . . PALMOLIVE RAPID SHAVE . . . super-moisturized for the fastest, smoothest shaves possible."

As the announcer says "a beard as tough as sandpaper," the picture shifts to the sandpaper mask, and a hand brings a can of "Rapid Shave" into view in front of the sandpaper, with the words "Super-Moisturized" and "Fastest Smoothest Shaves" appearing on the film under the shaving cream. The announcer's voice continues: "To prove RAPID SHAVE's super-moisturizing power, we put it right from the can. . . ." As this is being said, we see one hand pressing the top of the "Rapid Shave" can so as to dispense a small amount of lather into the other hand. The lather is then spread in one continuous motion upon the surface of the sandpaper and the first hand reappears with a razor and shaves a clean path through the lather and the gritty surface of the sandpaper. While this is taking place, the voice of the announcer continues ". . . onto this tough, dry sandpaper. It was apply . . . soak . . . and off in a stroke." These words are spoken at a normal conversational pace, and there is no "fade," [fol. 11] "dissolve," or other pictorial indication of any lapse of time between "apply," "soak," and "off in a stroke"; the intervals preceding and following the word "soak" last no more than a second.

The picture then shifts to Frank Gifford lathering his face as the announcer continues: "And super-moisturized Palmolive Rapid Shave can do the same for you."

At this point the "split screen" technique is introduced. On one side of the screen a hand is seen applying "Rapid Shave" to sandpaper in an action that parallels Gifford's



on the other side of the screen. As Gifford makes a razor stroke down his cheek, the hand makes a similar stroke down the lathered strip of sandpaper. Again, the shaving, on both sides of the screen, is begun directly after the lather is applied. And, again, there is no "fade," "dissolve" or other visual indication of any lapse of time between the lathering and shaving of the sandpaper, on one side of the screen, and Gifford's face, on the other. While this is being seen, the announcer says: "In this sandpaper test . . . or on your sandpaper beard, you just apply RAPID SHAVE . . . then . . . take your razor . . . and shave clean with a fast, smooth stroke."

We then see Gifford, stroking his clean-shaven face with a look of satisfied approval. The picture at this point shifts to cans of "Rapid Shave" surrounded by the words "Super-Moisturized" and "Fastest, Smoothest Shaves," while the announcer continues: "Try RAPID SHAVE . . . or cooling, soothing RAPID SHAVE-MENTHOL . . . both super-moisturized . . . for the fastest, smoothest shaves possible. They both outshave the tube . . . outshave the brush." In a concluding jingle, to a true reminiscent of "Here we go 'round the mulberry bush," an unseen male chorus sings lustily: "RAPID SHAVE outshaves them all. Use RAPID SHAVE in the morning."

The sights and sounds we have described proceed in a rapid sequence, the whole commercial lasting 60 seconds.

The second commercial here involved (Commission Exhibit 3) is exactly the same except that the football player [fol. 12] with the "sandpaper" beard is Kyle Rote, also of the New York Giants. The third commercial (Commission Exhibit 4) differs from the other two in not showing a celebrity. Quick dramatic effect is attained by likening the feel of a razor stroke to the stroking of a match on sandpaper. After a brief recitation of the shaving comfort to be derived from using "Rapid Shave," with appropriate pictorial accompaniment, the same "sandpaper test" described in the other commercials is repeated.

## II.

In one basic respect, the case is free from factual controversy. Respondents concede that the televised "sandpaper" demonstrations were conducted not on real sandpaper but on what is known in the industry as a "mock-up," or simulated prop. As the examiner found, "Actually no sandpaper was employed in the commercials. What was represented as sandpaper was in fact a mock-up made of plexiglass to which sand had been applied."

In dismissing the complaint, the examiner went on to explain, and to justify, respondents' use of a mock-up rather than actual sandpaper:

"There appear to be several reasons why it was not feasible to use sandpaper. One reason doubtless was that the length of the commercials—60 seconds—was not adequate for sandpaper to be soaked to the point where it could be shaved cleanly. Aside from this, however, there were technical difficulties peculiar to television. When placed under a television camera, sandpaper appears to be nothing more than plain, colored paper; the texture or grain of the sandpaper is not shown. Thus it is necessary to improvise—use a mock-up—if what is seen by the television audience is to have the appearance of sandpaper."

[fol. 13]

## III.

The examiner considered that the facts of the case raised only one question: "Has there been any material misrepresentation of the product?" To that question, the examiner answered:

"In the present case it seems clear that there has not. The shaving cream does possess at least adequate moistening or wetting properties and sandpaper can be shaved through use of the product, provided adequate time for soaking is allowed.

"Essentially, what is presented here would appear to be little or nothing more than a case of harmless exaggeration or puffing. Obviously the sandpaper sequences were employed simply for the purpose of emphasizing and dramatizing the recog-



nized moistening or wetting properties of the cream. It is difficult to believe that anyone could have been misled as to the properties or qualities of the product."

We believe the examiner erred, his answers being wrong essentially because he asked the wrong questions.

#### IV.

Initially, we put to one side any question as to the truthfulness of the factual premise stated in the commercials, namely, that a shaving cream which enables sandpaper to be shaved cleanly and quickly is equally effective in shaving a man's beard. Respondents, who have spent many thousands of dollars in advertising this product to millions of viewers, apparently believed that the public would accept an equivalence of whiskers and sandpaper in this respect. Accordingly, giving respondents the benefit of any doubts we might otherwise have in the matter, we will assume the truthfulness of the commercials in so far [fol. 14] as they represented that if "Rapid Shave" can shave sandpaper, it "can do the same for you."

As the Commission saw and heard the television commercials here involved, they contain two other basic representations:

(1) When applied to coarse, gritty sandpaper, "Rapid Shave" will so moisturize the sandpaper that, immediately upon lathering, it can be cleanly shaved.

(2) As proof of that fact, the viewers need not take respondents' word for it; they can see with their own eyes a test or demonstration of how "Rapid Shave" actually shaves such sandpaper.

Despite respondents' contentions to the contrary, we are satisfied that the complaint was sufficiently clear and specific to bring both of these representations into issue. Thus, the record presents two questions, not one:

(1) Was there a misrepresentation as to the moisturizing qualities claimed for "Rapid Shave"? Specifically, can it "shave" sandpaper in the manner described in the commercials?

(2) Assuming that there was no misrepresentation as to the effectiveness of "Rapid Shave" in shaving sandpaper, was there nonetheless a misrepresentation in the visual demonstration offered as proof of such effectiveness? Specifically, was it deceptive to the public and an unfair advertising practice for respondents to conduct a "sandpaper" test before the viewers' eyes to prove the product's "super-moisturizing power" on what was represented as sandpaper, and what the viewers had every reason to suppose was sandpaper, but was actually a plexiglass mock-up?

We now proceed to consider both these questions.

[fol. 15] 1. On the premise—which we have assumed to be true—that there is an equivalence in this respect between sandpaper and "a beard as tough as sandpaper," if respondents misrepresented the extent to which "Rapid Shave," when applied to sandpaper, permits it to be shaved quickly and cleanly, they undoubtedly engaged in a form of conduct proscribed by the statute. Advertisers may not make claims for the efficacy of their products which exceed the bounds of truth and reality.<sup>2</sup> The Commission is obligated to prevent "false advertising of a product, process or method which misleads, or has the capacity or tendency to mislead, the purchasing public into buying such product, process or method in the belief it is acquiring one essentially different." *Ford Motor Co. v. Federal Trade Commission*, 120 F. 2d 175, 181 (C.A. 6), cert. denied, 314 U. S. 668. If the public is to be induced to purchase a shaving cream by representations as to its effect on sandpaper, those representations must be true.

<sup>2</sup> See, e.g., *Carter Products, Inc. v. Federal Trade Commission*, 268 F. 2d 461 (C. A. 9), cert. denied, 361 U. S. 884; *Rhodes Pharmacal Co. v. Federal Trade Commission*, 208 F. 2d 382 (C. A. 7), modified, 248 U. S. 940; *Koch v. Federal Trade Commission*, 206 F. 2d 311 (C. A. 6); *American Medicinal Products, Inc. v. Federal Trade Commission*, 136 F. 2d 426 (C. A. 9); *Consolidated Book Publishers, Inc. v. Federal Trade Commission*, 53 F. 2d 942 (C. A. 7), cert. denied, 286 U. S. 553.

It was the uncontradicted testimony of an expert in coated abrasives and an official of respondent Bates that the plexiglass mock-up most closely resembled the grade of sandpaper commonly known as "extra-coarse." It is apparent to the Commission from its observation of the three commercials that this characterization in no way exaggerates the heavy, coarse appearance of the surface of the mock-up.

We find, upon review of the testimony, in conjunction with the sandpaper exhibits in the record, that:

(a) Sandpaper of the coarse, heavy variety depicted in the "Rapid Shave" commercials cannot successfully be shaved in the abbreviated time [fol. 16] available during the commercials even by employing a number of strokes under heavy pressure;

(b) Sandpaper of the coarse, heavy variety depicted in these commercials cannot successfully be shaved within one to three minutes after application of "Rapid Shave," even by employing a number of strokes under heavy pressure;

(c) No piece of sandpaper of the coarse, heavy variety depicted in these commercials that appears in the record has been shaved genuinely clean, as the television mock-up was, despite the allowance of up to an hour for soaking in "Rapid Shave"; and

(d) One reason why real sandpaper was not used in the "Rapid Shave" commercials was that it required too long a soaking period before effective shaving was possible.

The Commission's conclusion on this issue, therefore, is that sandpaper cannot be shaved by applying "Rapid Shave" in the manner, and for the length of time, depicted in the commercials, and that respondents' representations and demonstrations to that effect were false, misleading, and deceptive.

This is not to deny that, as the examiner found, some types of sandpaper can, in some circumstances, be shaved with "Rapid Shave," "provided adequate time for soaking is allowed." But that is beside the point. There is a public interest in protecting the consumer from decep-

[fol. 17] tion,<sup>3</sup> and in furthering that interest the Commission is guided by the "net impression which the advertisement is likely to make upon the general populace," *Charles of the Ritz Distributors Corp. v. Federal Trade Commission*, 143 F. 2d 676, 679 (C. A. 2), rather than "fine spun distinctions and arguments that may be made in excuse." *P. Lorillard Co. v. Federal Trade Commission*, 186 F. 2d 52, 58 (C. A. 4). These commercials clearly conveyed the impression that very coarse grades of sandpaper could be shaved immediately after "Rapid Shave" was applied. As our brief summary of the evidence of record indicates, this is simply not possible. Every effort in the hearing room to shave heavy sandpaper shortly after it received a coating of "Rapid Shave" ended in total failure. And the pre-hearing experiments of witness Joseph R. O'Neil, an expert in the field of coated abrasives, involving soaking periods of one to three minutes, met with no more success.

Nor was the visual impact of respondents' "sandpaper" demonstration—an impact that was plainly the main object of each commercial—softened by the single unobtrusive utterance of the word "soak." According to respondents, that word "necessarily implies the passage of time," and its inclusion in the "audio" part of the commercial cancelled out any representation otherwise made as to the speed with which "Rapid Shave" could be used in shaving sandpaper. However, the viewer is almost unaware that the word has been spoken, and the action that accompanies it flows rhythmically along without discernible pause. The Commission observed these commercials with an educated eye, forewarned that, from respondents' standpoint, "soak" was a keyword in the announcer's spiel. Even so, the word failed to convey to us the impression that respondents' counsel urged for it. How much less a flag of caution must it have been to the unin-

<sup>3</sup> See, e.g., *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67; *Mohawk Refining Corp. v. Federal Trade Commission*, 263 F. 2d 818 (C. A. 3), cert. denied, 361 U. S. 814; *Parke, Austin & Lipscomb, Inc. v. Federal Trade Commission*, 142 F. 2d 437 (C. A. 2), cert. denied, 323 U. S. 753; *Federal Trade Commission v. Balme*, 23 F. 2d 615 (C. A. 2), cert. denied, 277 U. S. 598.

itiate, gazing at their sets perhaps casually or distracted by other household activities. In these television commercials the pictorial demonstration was the thing,<sup>4</sup> and [fol. 18] the net effect of the spoken commentary was to accentuate rather than detract from it.

Respondents' arguments to the contrary are no more than technical quibbles over the breadth of the genus "sandpaper" and the dictionary definition of the word "soak." But the Commission is charged with the high duty of preventing public deception, and it must consider representations in actual context, not abstractly or in isolation, for "A statement may be deceptive even if the constituent words may be literally or technically construed so as to not constitute a misrepresentation." *Kalwajtys v. Federal Trade Commission*, 237 F. 2d 654, 656 (C. A. 7), cert. denied, 352 U. S. 1025.<sup>5</sup> The Commission is concerned with protecting the trusting as well as the suspicious, the casual as well as the vigilant, the naive as well as the sophisticated.<sup>6</sup> "It is for this reason that the Commission may 'insist upon the most literal truthfulness' in advertisements, *Moretrench Corp. v. Federal Trade Commission*, 2 Cir. 127 F. 2d 792, 795, and should have the discretion, undisturbed by the courts, to insist if it chooses 'upon a form of advertising' clear

<sup>4</sup> S. Watson Dunn, "Advertising—Its Role in Modern Marketing" (1961), p. 408: "Demonstration is so important it should be considered for every commercial. In many commercials demonstration of the product or service is the dominant theme. Since people are interested in what products will do for them, demonstration is usually good communication."

<sup>5</sup> And see, *Koch v. Federal Trade Commission*, 206 F. 2d 311, 317 (C. A. 6); *Bennett v. Federal Trade Commission*, 200 F. 2d 362, 363 (C. A. D. C.); *Rothschild v. Federal Trade Commission*, 200 U. S. 39, 42 (C. A. 7), cert. denied, 345 U. S. 941; *Bockenstette v. Federal Trade Commission*, 134 F. 2d 369, 371 (C. A. 10). Cf., *Donaldson v. Read Magazine, Inc.*, 333 U. S. 178, 188.

<sup>6</sup> See *Niresk Industries, Inc., v. Federal Trade Commission*, 278 F. 2d 337 (C. A. 7); *Parker Pen Co. v. Federal Trade Commission*, 159 F. 2d 509 (C. A. 7); *Progress Tailoring Co. v. Federal Trade Commission*, 153 F. 2d 103 (C. A. 7); *A. P. W. Paper Co. v. Federal Trade Commission*, 149 F. 2d 424 (C. A. 2), affirmed, 328 U. S. 193. Cf., *Donaldson v. Read Magazine, Inc.*, 333 U. S. 178.



enough so that, in the words of the prophet Isaiah, "way-faring men, though fools, shall not err therein." *Gen- [fol. 19] eral Motors Corp. v. Federal Trade Commission*, 2 Cir., 114 F. 2d 33, 36, certiorari denied 312 U. S. 682.

" *Charles of the Ritz Distributors Corp. v. Federal Trade Commission*, 143 F. 2d 676, 680 (C. A. 2). "

2. We turn next, to the contention mainly pressed on this appeal, namely, that use of the mock-up instead of real sandpaper in the demonstrations was not deceptive or misleading because it claimed no quality for "Rapid Shave" which it did not actually possess; and that, in any event, this was "little or nothing more than a case of harmless exaggeration of puffing" of the product's moistening properties.

This argument assumes, contrary to our findings of fact, that the commercials did fairly and truthfully describe "Rapid Shave's" effectiveness in shaving sandpaper. Even if that were so, the commercials would be deceptive, within the meaning of the statute, in the manner in which they deliberately misinform the viewer that what he sees being shaved is genuine "tough, dry sandpaper," rather than a plexiglass mock-up. There is no dispute that this is untrue. Did it tend to mislead the public, and was it an unfair advertising practice? We hold that it did, and it was.

If false advertising tends unfairly to divert business from competitors or to induce consumers to make purchases they might not otherwise make, it is certainly unlawful. The manner in which the mock-up was employed in the "Rapid Shave" commercials had the capacity to do both. Their entire sales pitch can be readily summarized:

If you have a tough "sandpaper" beard, you need a shaving cream with super-moisturizing power. A shaving cream that is effective in quickly and cleanly shaving rough, dry sandpaper can do the same for your beard. RAPID SHAVE has such super-moisturizing power, and we will prove it to you before your very eyes.

The heart of these commercials was the visual "sandpaper test"—a test that was, in reality, not taking place.

[fol. 20] This would be deceptive and unfair advertising even if "Rapid Shave" was as effective in shaving sandpaper as respondents represented. A likely result of such an illegal practice is that "purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might or might not buy if correctly informed. . . ." *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212, 217. "We are of opinion that the purchasing public is entitled to be protected against that species of deception, and that its interest in such protection is specific and substantial." *Ibid.*

Respondents urge, however, that if (assuming the fact to be true) their product will do to real sandpaper all that the mock-up demonstration claims for it, the consumer has not been induced to buy a product less valuable or meritorious than what he thought he was buying, and therefore he has not been hurt in any substantial way. But this has never been the test of what constitutes a material misrepresentation under the statute. "It is sufficient to find that the natural and probable result of the challenged practices is to cause one to do that which he would not otherwise do . . . and that the matter is of specific public interest." *Bockenstette v. Federal Trade Commission*, 134 F. 2d 369, 371 (C. A. 10). "It is not necessary that the product so misrepresented be inferior or harmful to the public; it is sufficient that the sale of the product be other than as represented." *L. & C. Mayers Co. v. Federal Trade Commission*, 97 F. 2d 365, 367 (C. A. 2).

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<sup>7</sup> And see *C. Howard Hunt Pen Co. v. Federal Trade Commission*, 197 F. 2d 273, 280 (C. A. 3), in which petitioner represented that its pen points were tipped with iridium, an unusually hard element of the platinum family:

"It is of no moment, in this proceeding in the public interest, that what the purchaser gets in the tipping material used on petitioner's pen points may be as serviceable as or almost as serviceable as iridium."

The court also pointed out that other manufacturers who tipped their pen points with the same hard material petitioner used and did not falsely claim that it was iridium were prejudiced by petitioner's misrepresentations.



[fol. 21] Respondents would have us hold that a television demonstration purporting to prove the qualities claimed for a product, where the public is told it is seeing one thing when it is actually seeing something different, is nonetheless lawful and not deceptive if in fact the product involved has the qualities claimed for it. This would flout the principles implicit in the multitude of cases which hold that one may not advertise so-called "phony" or dishonest testimonials;<sup>8</sup> or imply an erroneous source of origin for a product;<sup>9</sup> or fail to disclose that a product, although as good as a new one, has, in fact, been reprocessed;<sup>10</sup> or deceive the public into believing that one is in a certain line of business when this is not so.<sup>11</sup> The vice assailed in these cases is the use of falsification of fact, extrinsic to the objective value of the product, to sell that product, whether or not it may deserve to be bought on its own merits. "[T]he public is entitled to get what it chooses," and, "substitution would be unfair though equivalence were shown." *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, 77-78.

[fol. 22] Suppose, for example, that an advertisement for an obesity remedy shows the usual "before" and "after" pictures of users of the product. If those photographs

<sup>8</sup> See, e.g., *Niresk Industries, Inc., v. Federal Trade Commission*, 278 F. 2d 337 (C. A. 7) (unauthorized use of "Good Housekeeping Guaranty Seal"); *Federal Trade Commission v. Standard Education Soc'y*, 86 F. 2d 692 (C. A. 2), modified, 302 U. S. 112 (Encyclopedia testimonials); *Guarantee Veterinary Co. v. Federal Trade Commission*, 285 Fed. 853 (C. A. 2) (U. S. Army endorsement and military testimonial for a livestock salt block).

<sup>9</sup> E.g., *United States Navy Weekly, Inc., v. Federal Trade Commission*, 207 F. 2d 17 (C. A. D. C.); *El Moro Cigar Co. v. Federal Trade Commission*, 107 F. 2d 429 (C. A. 4); *Federal Trade Commission v. Army and Navy Trading Co.*, 88 F. 2d 776 (C. A. D. C.).

<sup>10</sup> E.g., *Mohawk Refining Corp. v. Federal Trade Commission*, 263 F. 2d 818 (C. A. 3), cert. denied, 361 U. S. 814; *Royal Oil Corp. v. Federal Trade Commission*, 262 F. 2d 741 (C. A. 4).

<sup>11</sup> E.g., *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212, *L. & C. Mayers Co. v. Federal Trade Commission*, 97 F. 2d 365 (C. A. 2); *Federal Trade Commission v. Mid West Mills, Inc.*, 90 F. 2d 723 (C. A. 7).

are "faked," it would obviously be no defense that the product is an effective appetite-depressant and could in fact bring about reduction in weight as represented in the "faked" pictures. The point is that the "proof" offered was a material element of the advertising; without it, the advertising might not have succeeded in selling the product; and in fact, the "proof" was not proof at all. The short of the matter is that the public and honest competitors are entitled to the protection which the law gives against such unfair and deceptive advertising practices.

In this case the pictorial test of "Rapid Shave," proving to any doubting Thomas in the vast audience that "By golly, it really *can* shave sandpaper!" was the clinching argument made by the commercials. The "sandpaper test" was conducted, as the announcer said, "[t]o prove Rapid Shave's super-moisturizing power. . . ." Without this visible proof of its qualities, some viewers might not have been persuaded to buy the product. At least, respondents must have thought so, or else they would not have emphasized the pictorial "sandpaper test" in the expensive television advertisements of their product. One need only consider the difference in the impact of these commercials on viewers had they been told, honestly and truthfully, that what they were seeing tested was a plexiglass mock-up rather than what they thought and were told they were seeing, namely, actual sandpaper. The difference between telling and not telling the truth could, in this instance at least, have been the difference between an effective and ineffective "sell." In such circumstances, the claim of "harmless exaggeration" is rather hollow.

Perhaps some consumers will be content with a product purchased in response to such a deceptive "come-on," but that is hardly legal justification for it. It could not atone, [fol. 23] for example, for the injury to a competing shaving cream manufacturer whose product might have fared better in the market place had respondents adhered to honest and fair advertising practices. "The law is violated if the first contact or interview is secured by deception. . . ." *Carter Products v. Federal Trade Commission*, 186 F. 2d 821, 824 (C. A. 7).

## V.

Respondents raise a number of specific defenses.

1. They suggest, first, that use of a plexiglass mock-up was justified because television's technical limitations cause sandpaper to look unreal when televised. We are told by respondents that the use of mock-ups or simulated props in television advertising is by no means unique to this case, and is a widespread practice in the industry. Thus, while the particular facts of this case may seem trivial, it raises the broad question whether mock-ups or simulated props may lawfully be used in television commercials to demonstrate qualities claimed for products, where the audience is told that it is seeing one thing being demonstrated while actually it is seeing something different.

As to the asserted technical limitations of the medium, the Commission is inclined to be somewhat skeptical. We doubt that the skills and resources available in television photography, in an industry which has made such striking technological advances in recent years, are as inadequate as they have been portrayed to us by counsel for respondents. However, assuming it to be the fact that there are indeed such limitations in television photography, the Commission can appreciate that these "technical" difficulties could give rise to problems for sponsors and agencies in determining how most effectively to use television in advertising their products. The limitations of the medium may present a challenge to the creative ingenuity and resourcefulness of copywriters; but surely they could not constitute lawful justification for resort [fol. 24] to falsehoods and deception of the public. The argument to the contrary would seem to be based on the wholly untenable assumption that the primary or dominant function of television is to sell goods, and that the Commission should not make any ruling which would impair the ability of sponsors and agencies to use television with maximum effectiveness as a sales or advertising medium.

Stripped of polite verbiage, the argument boils down to this: Where truth and television salesmanship collide, the former must give way to the latter. This is obviously an indefensible proposition. The notion that a sponsor

may take liberties with the truth in its television advertising, while advertisers using other media must continue to be truthful, is patent nonsense. The statutory requirements of truth in advertising apply to television no less than to other media of communication. Adherence to the truth should be no more of an impediment to effective advertising in television than in any other medium. But if, though we are inclined to doubt it, respondents do not believe they can effectively market their product on television within the legal requirements of truthful advertising, it does not follow that the Commission should relax those requirements. As was said in another case, if respondents "do not choose to advertise truthfully, they may, and should, discontinue advertising." *American Medicinal Products, Inc. v. Federal Trade Commission*, 136 F. 2d 426, 427 (C. A. 9). Only by disregarding this basic and salutary principle of the law could we give approval to respondents' advertising practices. "To fail to prohibit such evil practices would be to elevate deception in business and to give to it the standing and dignity of truth." *Federal Trade Commission v. Standard Education Soc'y*, 302 U. S. 112, 116.

2. A kindred argument, of the "parade of horrors" variety, is that a decision against respondents in this case will disrupt the entire television industry by prohibiting [fol. 25] all future use, in all circumstances, of props to simulate reality. This is, of course, absurd. No one objects to the use of papier mâché sets to represent western saloons or an actor's drinking iced tea instead of the alcoholic beverage called for by the script. The distinction between these situations and the one before us is obvious. The set designer is not attempting, through his depiction of the saloon, to sell us a saloon, nor is the actor, sipping at his drink, peddling bourbon. There is a world of difference between a casual display of steaming "coffee" that is really heated red wine (again, because of television's "technical difficulties"), and a commercial showing a close-up of what is actually red wine to the accompaniment of a claim that the high quality of the sponsor's coffee is proved by its rich, dark appearance—which the viewer can verify for himself simply by looking at the "coffee" on the screen. Similarly, an announcer may wear a blue

shirt that photographs white; but he may not advertise a soap or detergent's "whitening" qualities by pointing to the "whiteness" of his blue shirt. The difference in all these cases is the time-honored distinction between a misstatement of truth that is material to the inducement of a sale and one that is not.

3. Respondents further contend, and the hearing examiner agreed, that, even if exaggerated, the claims for "Rapid Shave's" moistening ability, as asserted through the "sandpaper" demonstration, amount to no more than harmless "puffing." We cannot agree. Puffing "is considered to be offered and understood as an expression of the seller's opinion only, which is to be discounted as such by the buyer, and on which no reasonable man would rely." *Prosser, Torts*, § 90, p. 557 (2d ed. 1955). Thus, sellers may generally, though not universally, assert that their products are "good," "wonderful," "dandy," and the [fol. 26] like,<sup>12</sup> but only because the use of these adjectives is "not designed to affect the intellect" but is "merely an accepted technique for urging the prospect to close the deal." Harper and McNeely, *A synthesis of the Law of Misrepresentation*, 22 Minn. L. Rev. 939, 1004-1005 (1938). The corollary of this proposition is that "puffing" does not embrace misstatements of material fact. At this point the law steps in to protect the buyer.<sup>13</sup>

"'Puffing' refers, generally, to an expression of opinion not made as a representation of fact. . . . While a seller has some latitude in 'puffing' his goods, he is not authorized to misrepresent them or to assign to them benefits or virtues they do not possess." *Gulf Oil Corp. v. Federal Trade Commission*, 150 F. 2d 106, 109 (C.A. 5).<sup>14</sup>

<sup>12</sup> See, e.g., *Carlay v. Federal Trade Commission*, 153 F. 2d 493 (C. A. 7); *Prosser, Torts*, § 90, pp. 557-558 (2d ed., 1955); *Williston, Contracts*, § 1491 (1937 rev. ed., Williston and Thompson).

<sup>13</sup> See, e.g., *Hogan v. McCombs Bros.*, 190 Ia. 650, 180 N. W. 770; *Foote v. Wilson*, 104 Kans. 191, 178 P. 430; *Cheetham v. Ferreira*, 73 R. I. 425, 56 A. 2d 861.

<sup>14</sup> See also, *Goodman v. Federal Trade Commission*, 244 F. 2d 584 (C. A. 9); *Steelco Stainless Steel, Inc., v. Federal Trade Commission*, 187 F.2d 693 (C. A. 7).



In this context, the argument that respondents only indulged in a little harmless puffing is obviously out of place. They represented, unqualifiedly, that "Rapid Shave" will dramatically facilitate the shaving of sandpaper and that they were demonstrating this fact before a television audience to prove it. Both of these were factual representations; neither is true.<sup>15</sup>

[fol. 27]

## VI.

1. Respondent Bates raises several defenses pertaining to it alone. It suggests, first, that the Commission is without authority to enter an order against it because it is not engaged in commerce within the meaning of the statute. There is no dispute that Bates prepared and placed for showing, over national network television, these commercials for "Palmolive Rapid Shave," a product distributed in interstate commerce.<sup>16</sup> In light of the

<sup>15</sup> Respondents rely on *Carlay Co. v. Federal Trade Commission*, 153 F. 2d 493 (C. A. 7); *Kidder Oil Co. v. Federal Trade Commission*, 117 F. 2d 892 (C. A. 7); and *Ostermoor & Co. v. Federal Trade Commission*, 16 F. 2d 962 (C. A. 2). None is in point. In *Carlay* the court found that petitioner's weight-reducing plan actually was relatively "easy," as claimed. In *Kidder* the court concluded that it was permissible puffing to advertise that a lubricant was "perfect" and would permit a car to run an "amazing distance" without additional lubricants. These cases do not involve the kind of factual distortion presented here.

Nor are respondents aided by the language in *Ostermoor* concerning puffing. The court's remarks on puffing were only general observations as to the framing of an order, while reversal of the Commission's order was based on insufficiency of the evidence. Respondents thus err in construing *Ostermoor's* value as a precedent for this case. Furthermore, the interpretation which respondents urge for that case, and the result for which the contend here, are inconsistent with the prevalent judicial and administrative policy of restricting rather than expanding, so-called puffing. See, e.g., *Kabatchnick v. Hanover-Elm Bldg. Corp.*, 328 Mass. 341, 103 N. E. 2d 692; *Prosser, Torts*, § 90 p. 559 (2d ed. 1955); *Williston, Contracts*, § 1494, p. 4169 (1937 rev. ed., Williston and Thompson).

<sup>16</sup> Bates has, with commendable forthrightness, long since admitted these facts. See, e.g., "Motion by Respondent Ted Bates & Company, Inc. to Dismiss the Complaint as to It upon the Ground That the Evidence Adduced Fails to Support the Charges Made in the Complaint," at p. 15.

precedents, one can hardly doubt the Commission's jurisdiction over an enterprise so basic to the flow of goods into the national market. It has been held, to cite a few representative examples, that Commission jurisdiction extends to businesses selling exclusively in intrastate commerce when they became participants in a combination to restrain interstate trade;<sup>17</sup> to regulations adopted by a local tobacco board of trade for the allotment of selling time to tobacco warehouses, since tobacco auctions are an integral part of interstate commerce in tobacco;<sup>18</sup> [fol. 28] to false and misleading representations made in an effort to obtain salesmen, because such representations constituted a part of the preliminary negotiations leading up to sales in interstate commerce and could not be separated from those sales;<sup>19</sup> and to a widely advertised automobile sales financing plan, even though it related solely to financing intrastate transactions between local dealers and their customers, because the plan and its advertising were an integral part of a national scheme of mass production and distribution.<sup>20</sup> The relation of Bates to the movement of goods in interstate commerce is no more tenuous or less direct than was the corresponding relation in any of the situations mentioned above.<sup>21</sup>

2. Bates argues additionally that it should not be held responsible for the illegality of the "Rapid Shave" com-

<sup>17</sup> *Federal Trade Commission v. Cement Institute*, 333 U. S. 683, 695-696.

<sup>18</sup> *Ashville Tobacco Board of Trade, Inc. v. Federal Trade Commission*, 263 F. 2d 502, 507-508. (C. A. 4).

<sup>19</sup> *Progress Tailoring Co. v. Federal Trade Commission*, 153 F. 2d 103, 105 (C. A. 7).

<sup>20</sup> *Ford Motor Co. v. Federal Trade Commission*, 120 F. 2d 175, 183 (C. A. 6), cert. denied, 314 U. S. 668.

<sup>21</sup> Bates' reliance on *Federal Trade Commission v. Bunte Brothers, Inc.*, 312 U. S. 349, is misplaced. There the sole activity involved was the marketing of a product exclusively within the borders of a single state. Here respondent has prepared and placed advertisements knowing that they would be shown nationwide in the promotion of a product sold in interstate commerce. The *Bunte* case is thus not in point.



mercials, since it acted merely as an agent for Colgate-Palmolive in preparing and placing them. We find this a curious contention. Bates not only carried these commercials to the television network; it originated the idea for the "sandpaper tests" in the first place.<sup>22</sup> We know of no doctrine that permits one to evade liability for actions for which he is as directly responsible as this; regardless of whether he acted solely in his own interest or also for the benefit of another.<sup>23</sup> Bates' argument is merely another variation of the oft-repeated effort to avoid responsibility for a violation of the statute by shifting it to another. These attempts are uniformly unsuccessful. Thus, even though a respondent does not directly engage in unlawful activity, it may be held to have violated the Act if it has provided other with the means of doing so.<sup>24</sup> Even on an interpretation of the facts highly favorable to Bates, it has done at least this much. Or, to cite another instance, if a corporate officer has participated in the planning or execution of unfair trade practices by his corporate master, the status of the corporation as an independent legal entity is no barrier to an order running against him as an individual.<sup>25</sup> All that is necessary to establish liability in this type of case is that the corporate officer "be shown to have had such connection with the wrong as would have made him an accomplice were it a crime, or a joint tortfeasor, were the corporation an individual." *Federal Trade Commis-*

<sup>22</sup> See "Motion by Respondent Ted Bates & Company, Inc.," *supra* note 16, at p. 18.

<sup>23</sup> In fact, the general rule seems quite to the contrary. See e.g., *American Law Institute, Restatement of Agency, Second*, §§ 343, 348, 350 (1958).

<sup>24</sup> See, e.g., *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483; *C. Howard Hunt Pen Co. v. Federal Trade Commission*, 197 F. 2d 273 (C. A. 3).

<sup>25</sup> See, e.g., *Federal Trade Commission v. Standard Education Soc'y*, 302 U. S. 112; *Consumer Sales Corp. v. Federal Trade Commission*, 198 F. 2d 404 (C. A. 2), cert. denied, 344 U. S. 912; *Gelb v. Federal Trade Commission*, 144 F. 2d 580 (C. A. 2); *Guarantee Veterinary Co. v. Federal Trade Commission*, 285 Fed. 853 (C. A. 2).

sion v. *Standard Education Soc'y*, 86 F. 2d 692, 695 (C. A. 2), modified, 302 U. S. 112. The facts leave no doubt that Bates' part in the creation and dissemination of the "Rapid Shave" commercials satisfies this test.

3. Bates has suggested that these principles are inapplicable to it because it did not know its "sandpaper test" [fol. 30] commercials would be held to be false and misleading, and it therefore did not intentionally violate the Act. It is so well settled that there is no necessity to prove intent to deceive in establishing a violation of the Act<sup>26</sup> that this contention can only be regarded as frivolous.

## VII.

We arrive finally at the question of the scope and content of the order to be issued against Colgate-Palmolive and Ted Bates. Respondents were apprised of the order proposed by counsel supporting the complaint as early as March 20, 1961, when it was filed with the Secretary of the Commission. The question was raised and discussed on April 6, 1961, in oral argument before the hearing examiner. Counsel for all parties argued the matter in their briefs on appeal, and the subject was considered again in oral argument before the Commission. Respondents have thus not only had fair notice and ample opportunity to make known their views concerning the breadth of the order; they have done so. The Commission has carefully considered all of respondents' views and objections to the form, content, and scope of the proposed order and is fully justified in promulgating its order without further delay.

The appropriate scope of the order must be determined in the context of the statute and the authoritative precedents. Section 5 of the Act states that "Unfair methods of competition in commerce, and unfair or deceptive

<sup>26</sup> See, e.g., *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67; *Koch v. Federal Trade Commission*, 206 F. 2d 311 (C. A. 6); *Gimbel Bros., Inc., v. Federal Trade Commission*, 116 F. 2d 578 (C. A. 2); *L. & C. Mayers Co. v. Federal Trade Commission*, 97 F. 2d 365 (C. A. 2).

acts or *practices* in commerce, are declared unlawful" (emphasis added). 15 U. S. C. § 45(a)(1). It empowers the Commission to prevent parties within its jurisdiction "from using unfair *methods* of competition in commerce [fol. 31] and unfair or deceptive acts or *practices* in commerce" (emphasis added); 15 U. S. C. § 45(a)(6). It further declares that, if the Commission finds that the method of competition or act or practice in question is of the prohibited sort, it shall issue an order requiring the respondent "to cease and desist from using such *method* of competition or such act or *practice*" (emphasis added). 15 U.S.C. § 45(b). The clear implication of this language—especially in its differentiation between "acts" and "practices"—is that the Commission's authority to ascertain and prevent violations of the statute extends beyond the unique facts of a given case to the more general and significant problem of the "method" of competition or trade "practice" involved.

The cases bear out this interpretation. The courts have given the Commission broad authority to tailor the remedy to the violation found.<sup>27</sup> The language of the cases, like the statute, has always employed the generic term "practices," and it has frequently been made clear that the Commission's authority—indeed, its obligation—in framing an order extends to the prevention of unfair

<sup>27</sup> For example:

"If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity. Moreover, [t]he Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices' disclosed. *Jacob Siegel Co. v. Federal Trade Comm'n*, 327 U. S. 608, 611 (1946). Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices. Therefore we have said that 'the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.' *Id.*, at 613." *Federal Trade Commission v. Ruberoid Co.*, 343 U. S. 470, 473.

types or forms of conduct rather than merely isolated [fol. 32] acts.<sup>28</sup> For the reasons set forth below, we think the public interest compels the entry of an appropriately broad order here.

This case did not come to us vacuum-packed. The violations of law found here cannot be treated as isolated, discrete phenomena. As has already been noted, the problem of deceptive television advertising, although recent in origin, is making its appearance on the Commission's docket with increasing frequency. Although most of the cases have ended in orders based on consent agreements<sup>29</sup> reciting, as is customary, that respondents in no way admit illegality, they nonetheless indicate the prevalence and growing seriousness of the problem. It is a problem with which both respondents have had prior ex-

<sup>28</sup> For example:

"[T]he Commission's power would be limited indeed if it were restricted to enjoining unfair acts of competitors only as evidenced in the past. To be of any value the order must proscribe the method of unfair competition as well as the specific acts by which it has been manifested. In no other way could the Commission fulfill its remedial function." *Hershey Chocolate Corp. v. Federal Trade Commission*, 121 F. 2d 968, 971-972 (C. A. 3).

"Commission orders are not designed to punish for past transgressions, but are designed as a mean for preventing 'illegal practices' in the future." *Federal Trade Commission v. Ruberoid Co.*, supra, 343 U. S. at page 473. . . . To the end that the Commission may achieve that purpose, its orders may prohibit not only the further use of the precise practice found to have existed in the past, but also, the future use of related and similar practices." *Nireak Industries, Inc. v. Federal Trade Commission*, 278 F. 2d 337, 343 (C. A. 7).

<sup>29</sup> *Menne Co.*, D. 8146, May 4, 1961; *Aluminum Company of America*, D. 7735, March 4, 1961; *Eversharp, Inc.*, D. 7811, Sept. 30, 1960; *Standard Brands, Inc.*, D. 7737, June 1, 1960; *Brown & Williamson Tobacco Co.*, D. 7688, Feb. 24, 1960; *Max Factor & Co.*, 55 F. T. C. 1328; *Adell Chem. Co.*, 54 F. T. C. 1801; *American Chicle Co.*, 54 F. T. C. 1625; *Lanolin Plus, Inc.*, 54 F. T. C. 446.

Two cases, *Colgate-Palmolive Co.*, D. 7660, March 9, 1961; and *Hutchinson Chemical Corp.*, 55 F. T. C. 1942, have been fully litigated before the Commission.

[fol. 33] perience.<sup>30</sup> Against this factual background, the Commission would be derelict in its duty to protect the public if the order were confined merely to advertisements for "Rapid Shave" or to the use of mock-ups made of plexiglass and sand. So narrow a conception of the appropriate scope of the remedy in this type of case would necessitate a separate suit to terminate each of the myriad subtly distinct forms that deceptive depictions and demonstrations may take—an intolerable result from the standpoint of the public interest. Rather, in the face of widespread and increasing use of deceptive and unfair advertising practices in television,<sup>31</sup> we are "obliged not only to suppress the unlawful practice but to take such reasonable action as is calculated to preclude the revival of the illegal practices." *Federal Trade Commission v. National Lead Co.*, 352 U. S. 419, 430. We can achieve this end simply by following the words of the statute and banning repetition of the "practice" found unlawful. That is a narrower and more limited prohibition than the Supreme Court has already upheld in affirming the Commission's authority, "as a prophylactic and preventive measure," to enjoin not only the practices found to be violations but also other "like and related" practices. *Federal Trade Commission v. Mandel Bros., Inc.*, 359 U. S. 385, 393.

We conclude that the order cannot be confined to a single product or a single means of deception. We think, however, that counsel supporting the complaint ask for too much when they seek, in addition to a ban against [fol. 34] false and deceptive depictions and demonstrations, a prohibition against "[m]isrepresenting in any

<sup>30</sup> As to Colgate-Palmolive, see *Colgate-Palmolive Co.*, D. 7660, March 9, 1961. As to Ted Bates, see *Standard Brands, Inc.*, D. 7737, June 1, 1960; *Brown & Williamson Tobacco Co.*, D. 7688, Feb. 24, 1960.

<sup>31</sup> Besides the many that have come to our attention as the result of applications for complaints and our own investigations, we are informed by counsel for respondents that use of mock-ups in television commercials, apparently indiscriminately, is common practice.



manner the quality or merits of any . . . product." <sup>33</sup> So broad and indefinite a command would be most difficult to obey, even in the best of faith, and it will be omitted from the order. We think a more narrow and specific prohibition should suffice here. Accordingly, our order will—in addition to the provisions already discussed—prohibit, in general, the misrepresentation of the quality or merits of "Rapid Shave," or any other shaving cream.

In sum, we have carefully considered the form, scope, and content of the order and are fully satisfied that it is fair and reasonable, necessary and appropriate to prevent recurrence of the illegal practices, sufficiently specific and concrete to permit ready compliance, and no broader than protection of the public requires.

December 29, 1961.

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<sup>33</sup> "Proposed Findings, Conclusions and Order" of Counsel Supporting the Complaint, at p. 10.

[fol. 35]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT.

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No. 5972.

COLGATE-PALMOLIVE COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

---

No. 5986.

TED BATES & COMPANY, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

---

DECREE—November 20, 1962

This cause came on to be heard on petitions for review of an order of the Federal Trade Commission, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the Federal Trade Commission is set aside. Further proceedings are to be in accordance with the opinion filed this day.

By the Court:

ROGER A. STINCHFIELD, Clerk.

By: /s/ DANA H. GALLUP,  
Chief Deputy Clerk.



[fol. 37]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT.

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No. 5972.

COLGATE-PALMOLIVE COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

---

No. 5986.

TED BATES & COMPANY, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

---

*On Petitions to Review an Order of  
the Federal Trade Commission.*

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Before WOODBURY, Chief Judge and HARTIGAN and ALD-  
RICH, Circuit Judges.

MATHIAS F. CORREA, with whom ARTHUR MERMIN,  
CORYDON B. DUNHAM, JOHN F. GRODEN, CAHILL,  
GORDON, REINDEL & OHL and WITHINGTON, CROSS,  
PARK & MCCANN were on brief, for petitioner in  
No. 5972.

JOSEPH A. MCMANUS, with whom LANE MCGOVERN,  
COUDERT BROTHERS and ROPES & GRAY were on  
brief for petitioner in No. 5986.

MILES J. BROWN, Attorney, with whom JAMES MCL.  
HENDERSON, General Counsel, J. B. TRULY, As-  
sistant General Counsel, and FREDERICK H. MAY-  
ER, Attorney, were on brief, for respondent.

[fol. 38]

## OPINION OF THE COURT—November 20, 1962

ALDRICH, Circuit Judge. These petitions to review and set aside a cease and desist order of the Federal Trade Commission are noteworthy principally because of the extremes to which the dispute has led the parties. We shall refer to the petitioners as they were below, viz., as respondents. Respondent Colgate-Palmolive Company with the aid and at the suggestion of its advertising agency, respondent Ted Bates & Company, in 1959 released three substantially similar television commercials (hereinafter referred to in the singular) to advertise the "moisturizing" qualities of Colgate's pressurized shaving preparation Palmolive Rapid Shave, hereinafter the cream. The commercial was a dramatic "audio" and "video" exposition in which sandpaper was apparently shaved with a safety razor with a single stroke immediately following the application of the cream. This demonstration, it was vocally claimed, "proved" the moisturizing qualities of the cream and that it would have the same effect "for you." In fact the demonstration did not employ sand paper at all, but a simulated mock-up of sand on plexiglass. The Commission brought a civil complaint against respondents, charging misrepresentations in that "... said visual demonstration was a 'mock-up' . . . [and] does not prove the 'moisturizing' properties of Palmolive Rapid Shave, in actual use, for shaving purposes." Respondents' answers admitted that the demonstration was a mock-up, but asserted that the "commercials contained a fair and true illustration of the otherwise proven fact that Palmolive Rapid Shave has excellent 'wetting qualities.'" Following a trial the [fol. 39] Commission issued a broad order against both respondents of which they now seek review.

Respondents' first defense is that the cream did in fact permit the shaving of sandpaper as apparently shown, so that there was no misrepresentation. This

<sup>1</sup> See *Carter Products, Inc. v. Colgate-Palmolive Co.*, 4 Cir., 1959, 269 F.2d 299.

claim is conspicuously lacking in merit. Ordinary coarse sandpaper can be shaved, but not until the cream has remained upon it for upwards of an hour. Even if we could assume that a particularly fine grade of paper, described as "finishing paper," could fall within the common understanding of what the audio portion described as "tough"<sup>2</sup> sandpaper, which we may doubt, and even if the visual demonstration, which was clearly of a coarse<sup>3</sup> brand of sandpaper, did not conclusively foreclose that assertion in this case, which we doubt even more, respondents are not aided. Their best evidence was that even finishing paper required that the cream rest upon it for one to three minutes before shaving was possible. The video portion of the demonstration shows no such inconvenient wait, but graphically exhibits no pause or break between the application of the cream to the paper, the reaching for the razor, and the shaving operation. It is true that the accompanying audio portion of the commercial uses the word "soak." Respondents contend that soaking means an appreciable passage of time. The Commission was well warranted in finding that the word "soak" was so unobtrusive that many viewers might not notice it, and that even those who did [fol. 40] might conclude that the length of the announced soaking was not one to three minutes or more, but the insignificant interval defined by the visual portrayal, the same as was shown for "soaking" the human beard.<sup>4</sup> It

<sup>2</sup> Respondents object to the Commission's reference to the adjective "tough" because it was not specifically mentioned in the complaint, and elsewhere make other, similar, objections. There was no dispute as to what was in the commercial. We can not think the complaint had to set forth every word.

<sup>3</sup> Counsel for respondents claim that the purported sandpaper looked coarser on the movie exhibit introduced in evidence by the Commission than it appeared to the television viewers. Apart from the absence of evidentiary support for this contention, it is pointless in the light of the candid testimony of one of Bates' employees that the commercial's sandpaper appeared coarser than the finishing paper on which respondents rely.

<sup>4</sup> Respondents do not make the contrary suggestion that beards, too, must be soaked for one to three minutes. Indeed, they could not, without making the picture a serious misrepresentation in another respect.

should be obvious by now to anyone that advertisements are not judged by scholarly dissection in a college classroom. *F. T. C. v. Standard Education Society*, 1937, 302 U. S. 112, 116; *Aronberg v. F. T. C.*, 7 Cir., 1942, 132 F. 2d 165.

Respondents next contend that the length of time required to shave sandpaper was not within the pleadings.

We agree with them that the Commission did not happily phrase its order denying a motion to amend the complaint. Although respondents predicate some argument on this denial, which the Commission might well have anticipated, one may nevertheless question how seriously they were misled into thinking the issue was simply whether sandpaper of a variety not depicted could eventually be shaved, when the complaint plainly charged that the "commercials, which include a visual demonstration . . . represented, directly or by implication, that . . . it is possible to forthwith shave off the rough surface of said sandpaper . . ." More important, respondents have not been able to suggest to us how, in the light of the evidence which they introduced after a suitable interval to prepare against the Commission's showing, they have been prejudiced. Rather, we think they are simply trying to restrict the issue to one they might be able to meet, instead of one they plainly cannot. The Commission rejected this attempt, and we agree.

Next, respondents assert that the commercial, even if not true with respect to sandpaper, was mere metaphorical puffing; that there is no contention that the cream [fol. 41] did not possess entirely adequate moisturizing properties for shaving humans (the Commission makes no claim of inadequacy of the cream); that no one bought the cream intending to shave sandpaper, and that therefore there was no misrepresentation as to any material matter. Within limits we are sympathetic with the principle allegedly underlying respondents' contention. Graphic visual demonstrations that have dramatic appeal may well be mere puffing. References to sandpaper beards may of themselves be harmless, and so may be pictures illustrating the analogy. We see no

objection to obvious fancy, provided there is no underlying misrepresentation. But respondents' difficulty is that they do not come under any such principle. They went far beyond generalities and eye-catching devices into asserting as a fact that the cream enables sandpaper to be shaved forthwith, and that this fact "proved" the cream's properties for shaving humans. They cannot now suggest that ability to shave sandpaper forthwith was an irrelevant fact and an irrelevant representation.<sup>5</sup> We agree with the Commission that it is immaterial that the cream may in fact have adequate shaving qualities. If a misrepresentation is calculated to affect a buyer's judgment it does not make a fair business practice to say the judgment was capricious. *Mohawk Refining Corp. v. F. T. C.*, 3 Cir., 1959, 263 F. 2d 818, cert. den. 361 U. S. 814; *C. Howard Hunt Pen Co. v. F. T. C.*, 3 Cir., 1952, 197 F. 2d 273.

It may well be that little injury was done to the public by respondents' representations. We suggested in our opening sentence that we consider this a rather trivial case. Nonetheless, we could not possibly say that it was not within the province of the Commission to conclude that such conduct should be forbidden. Colgate's motion to dismiss the complaint was properly denied.

[fol. 42] Respondent Bates contends that as a mere advertising agency no order should be entered against it in any event. On one occasion the Commission has drawn such a distinction on the ground that the agency was but a secondary actor. This ruling, however, was expressly stated to be a matter of "sound discretion." *Bristol-Myers Co., et al.*, 1949, 46 F.T.C. 162, 176. Where, as here, the Commission was warranted in finding that the advertising agency was an active, if not the prime, mover, we could not say that the Commission lacked either jurisdiction or discretion. Cf. *C. Howard Hunt Pen Co. v. F.T.C.*, *supra* at 281; *Chas. A. Brewer & Sons v. F.T.C.*, 6 Cir., 1946, 158 F.2d 74;

<sup>5</sup> The Commission makes an interesting counter-suggestion. If shaving sandpaper did not prove something about shaving humans, was there not a still further misrepresentation?



see also *National Cash-Register Co. v. Leland*, 1 Cir., 1899, 94 Fed. 502; 507 *cert. den.* 175 U.S. 724.

Very different questions, however, arise when we come to the scope of the order. The interdiction of which respondents principally complain prohibits the following:

"Representing, directly or by implication, in describing, explaining, or purporting to prove the quality or merits of any product, that pictures, depictions, or demonstrations, either alone or accompanied by oral or written statements, are genuine or accurate representations, depictions, or demonstrations of, or prove the quality or merits of, any product, when such pictures, depictions, or demonstrations are not in fact genuine or accurate representations depictions or demonstrations of, or do not prove the quality or merits of, any such product."

Analysis of this portion of the order shows it to be quite ambiguous. On first reading we had thought that, in effect, it simply forbade demonstrations which represented a product as doing something that it could not do, or as appearing to have qualities which it did not possess. There could be no objections to such an order, except respondents' special objection that this particular [fol. 43] one embraces too many products. But respondents say that the language goes far beyond such conduct, and would prohibit any demonstration even if it did not misstate facts about, or misrepresent the appearance of, the product, if it was not "genuine" in that the actual substance used in the studio, because of technical problems of photography, was not the product itself. In other words, it would be no defense that, as the examiner found on undisputed testimony here, the shaving of sandpaper, even when in fact accomplished, does not properly reproduce on television and must be simulated to be effective. Similarly, it appears that coffee, orange juice and iced tea lose their true colors, so that artificial substances have to be substituted to make them look natural, while in another area products such as ice cream and the "head" on beer melt under the hot



camera lights and require the use of more stable substitutes. On consideration we agree with respondents that the order may be read as forbidding such conduct. Furthermore, we believe that this was the Commission's intention.\* In its opinion accompanying the order the Commission stated that one of the issues was whether, even if the cream permitted the shaving of sandpaper precisely as pictured, there was "nonetheless a misrepresentation . . . and an unfair advertising practice." The Commission resolved this issue by concluding that it was "an illegal practice," and was likely to deceive the public and cause purchasers to buy what otherwise they would not have bought.'

[fol. 44] We, of course, agree with the Commission that there is a misrepresentation, of a sort, in any substitution case. But we are unable to see how a viewer is misled in any material particular if the only untruth is one the sole purpose of which is to compensate for deficiencies in the photographic process. The Commission has put the shoe on the wrong foot. What the viewers are interested in, and moved by, is what they see not by the means. We suggested to counsel that this could be readily tested. Suppose, in the case of color television, a milk producer wishes to advertise the rich quality of his

\* Indeed, the Commission seemed eager to raise this question. For example: "Thus, while the particular facts of this case may seem trivial, it raises the broad question whether mock-ups or simulated props may lawfully be used in television commercials to demonstrate qualities claimed for products, where the audience is told that it is seeing one thing being demonstrated while actually it is seeing something different."

To be doubly sure our understanding of the Commission's position was correct, we put the following case to its counsel. Suppose a prominent person is photographed saying, "I love Lipsom's iced tea," while, apparently, he drinks a glass of iced tea. In truth the individual does like Lipsom's tea, and frequently drinks it, but for the above-mentioned technical reasons is then drinking colored water. What the viewer sees on the screen looks exactly as Lipsom's iced tea does in fact look. Asked if this would be misconduct, counsel replied that it was the Commission's position that it would be, because the viewer had been led to believe he is seeing iced tea when in fact he is not.

cream. Obviously he cannot use a foreign substance so that his product will appear yellower and richer than it is. But, equally should he be allowed to use his own cream if he knows that by the normal photographic process its color would be changed so as to appear substantially better on the screen than it was? We suspect the Commission would think it clear he could not. Yet if he used an artificial substance in order to produce the exactly correct appearance, under the Commission's rule there would be deceit. Counsel gave no answer. We are not critical of counsel, because we think his client has left him without one.<sup>8</sup>

The Commission has confused two entirely different situations. Of course, as we have already said, if a purported demonstration attributes to a product quality [fol. 45] ties it does not in fact possess, the advertiser will not be permitted to say that the product can still do all it needs to do, or is "just as good" even though it does not have the claimed characteristic. The Commission properly said that the customer is entitled to get what he is led to believe he will get, whether he is right or wrong in thinking it makes a difference.<sup>9</sup> But where

<sup>8</sup> We realize that counsel might have replied that products which do not photograph accurately should never be represented. This would seem—at least to those who use television commercials—a drastic remedy. We believe the burden should be on the Commission to demonstrate an equivalent need.

<sup>9</sup> The Commission also relied on what it called "phony" testimonial cases. *F. T. C. v. Standard Education Society*, *supra*, at 118; *Niresk Industries, Inc. v. F. T. C.*, 7 Cir., 1960, 278 F.2d 337, *cert. den.*, 364 U.S. 883. We would agree that it is an unfair advertising practice to publish a purported testimonial when none had been received, even if, from the fact that the advertiser's sales were high and constant, it must be obvious that he has many satisfied customers. A more accurate analogy would be if the advertiser did in fact receive a testimonial, but written in ink that would not photograph. Would the advertiser be guilty of deceit if he copied it over and photographed the copy? If an endorser may not be shown enjoying colored water that looks like, but is not, iced tea, then, seemingly, it would not be "genuine" to photograph a copy of a testimonial leading viewers to believe it was an original document. It is difficult to think the Commission fully appreciated the principle it has espoused.

the only untruth is that the substance he sees on the screen is artificial, and the visual appearance is otherwise a correct and accurate representation of the product itself, he is not injured. The viewer is not buying the particular substance he sees in the studio; he is buying the product. By hypothesis, when he receives the product it will be exactly as he understood it would be. There has been no material deceit.

The present order must be set aside. We do not, of course suggest that it was erroneous in every particular, but the Commission's fundamental error so permeates the order that we think it best that an entirely new one be prepared. We also think it best that the Commission be the one to do so. We will make, however, two suggestions. The Commission has directed this part of its order to every kind of product that Colgate may hereafter advertise, and, in the case of Bates, with regard [fol. 46] to every customer. If mock-ups, or what the Commission chooses to call demonstrations that are not "genuine," were illegal per se, then it might be appropriate, although we need not decide, to enter a broad order forbidding all such demonstrations en masse. We have undercut the basis for any such order. Under our construction there is no showing of any "method" or "practice" in the sense discussed by the Commission in its opinion. Respondents' only offense was the making of a single misrepresentation about a single product. The fact that this was accomplished by a "demonstration" did not warrant a broad order against all future misrepresentations of any kind by demonstrations any more than the fact that a misrepresentation was made in print would justify an order against all future misrepresentations of any kind by printing. The Commission has revealed that it is well aware of the scope to be applied to single misrepresentations, and we need say no more on this subject. See e.g., *Colgate-Palmolive Co.*, Docket No. 7660, March 9, 1961, Trade Reg. Rep., (1960-61 Trans-fer Binder) ¶ 29445.

Secondly, with respect to the respondent Bates, we think there may well be distinction between a principal and an agent in the permissible scope of an order. In

some degree a principal may well be held to advertise at his peril. But we have reservations as to how far it is appropriate to go in the case of an agent, in the absence, at least, of any suspicion on its part that the advertisement is false. *Cf. Bristol-Myers Co., supra.*

*Judgment will be entered setting aside the order of the Commission. Further proceedings to be in accordance with this opinion.*

[fol. 47]

BEFORE  
FEDERAL TRADE COMMISSION

## Commissioners:

PAUL RAND DIXON, Chairman,  
SIGURD ANDERSON,  
PHILIP ELMAN,  
EVERETTE MACINTYRE,  
A. LEON HIGGINBOTHAM, JR.

Docket No. 7736.

## IN THE MATTER OF

COLGATE-PALMOLIVE COMPANY, a corporation, and  
TED BATES & COMPANY, INC., a corporation.

Order Providing for the Filing of Exceptions to  
Proposed Final Order.

IT IS ORDERED that respondents may, within twenty (20) days after service upon them of this order and the attached opinion of the Commission, file with the Commission their exceptions to any provisions of the Proposed Final Order, a statement of their reasons in support thereof, and a proposed alternative form of order appropriate to the Commission's decision; and that complaint counsel may, within ten (10) days after service of respondents' exceptions, file a statement in reply thereto.

[fol. 48] IT IS FURTHER ORDERED that if no exceptions to the Commission's Proposed Final Order are filed within twenty (20) days, the said Proposed Final Order shall then become the final order of the Commission.

PROPOSED FINAL ORDER.—Issued February 18, 1963

It IS ORDERED that respondent Colgate-Palmolive Company, a corporation, and its officers, agents, representa-

tives, and employees, directly or through any corporate device, do forthwith cease and desist from using the following methods of competition or acts or practices in commerce, as "commerce" is defined in the Federal Trade Commission Act:

1. Advertising any product by presenting a visual test or demonstration represented to be actual proof of a claim made for the product, where the test or demonstration does not constitute actual proof because a mock-up or substitute material or article is used in the test or demonstration instead of the genuine material or article represented to be used therein.
2. Advertising Rapid Shave or any other shaving cream by claiming for it qualities or merits that the product does not in fact possess.

IT IS FURTHER ORDERED that respondent Ted Bates & Company, Inc., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate device, do forthwith cease and desist from engaging in the following methods of competition or acts or practices in commerce, as "commerce" is defined in the Federal Trade Commission Act:

1. Advertising any product by presenting a visual test or demonstration represented to be actual proof of a claim made for the product, where the test or [fol. 49] demonstration does not constitute actual proof because a mock-up or substitute material or article is used in the test or demonstration instead of the genuine material or article represented to be used therein.
2. Advertising Rapid Shave or any other shaving cream by claiming for it qualities or merits that the product does not in fact possess, unless respondent shows that it neither had knowledge of the falsity of such representation nor had any reason to question its truthfulness.

IT IS FURTHER ORDERED that respondents shall, within sixty (60) days after service upon them of this order,



file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

By the Commission; Commissioners Anderson and Higginbotham concurring in the result.

SEAL

JOSEPH W. SHEA,  
JOSEPH W. SHEA,  
Secretary.

[fol. 50]

BEFORE

## FEDERAL TRADE COMMISSION

Commissioners:

PAUL RAND DIXON, Chairman,  
SIGURD ANDERSON,  
PHILIP ELMAN,  
EVERETTE MACINTYRE,  
A. LEON HIGGINBOTHAM, JR.

Docket No. 7736.

IN THE MATTER OF

COLGATE-PALMOLIVE COMPANY, a corporation and  
TED BATES & COMPANY, INC., a corporation:

OPINION OF THE COMMISSION ON REMAND—February  
18, 1963

By Commissioner Elman:

This case is again before the Commission, on remand from the Court of Appeals for the First Circuit.

On December 29, 1961, the Commission, finding that Colgate-Palmolive Company and its advertising agency, Ted Bates & Company, Inc., had violated Section 5 of the Federal Trade Commission Act issued a cease and desist order against them. The Commission found that respondents, in numerous television commercials advertising [fol. 51] the moisturizing qualities of Colgate's Rapid Shave cream, engaged in two distinct unfair and unlawful practices and methods of competition: (1) misrepresenting the qualities or merits of the product; and (2) using a sham demonstration purporting to prove a claim made for the product but which, because of the undisclosed substitution of a mock-up, did not in fact prove the claim. Our order was designed to prohibit respondents from continuing to engage in both of these illegal forms of advertising.

As to the first practice prohibited by the Commission's order, i.e., misrepresentation of the qualities of shaving

cream products, the Court of Appeals in its opinion of November 20, 1962, sustained the Commission's decision, apparently in all respects. However, with respect to the second practice, i.e., the use of spurious television commercial demonstrations, the Court found the apparent reach of our order to be ambiguous. On the basis of an interpretation of the order it believed to be supported by our previous opinion and by certain statements made by Commission counsel during the oral argument of the appeal, the Court held that the order was permeated by "fundamental error" and went too far in prohibiting practices that do not violate Section 5. The case was accordingly remanded to permit the Commission to formulate a new order (310 F. 2d 89).

The appellate proceedings in this case demonstrate once again the imperative need for explicitness in administrative adjudication. An agency whose actions are subject to appellate review must always be mindful of its duty to the reviewing court to express clearly both the rationale and the bounds of its decision. As Mr. Justice Cardozo put it, the court "must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States v. Chicago M., St. P., [fol. 52] & P. R. R.*, 294 U. S. 499, 511 (1935); and see *SEC v. Chenery Corp.*, 318 U. S. 80, 94 (1943).

Reexamined in the light cast by the opinion of the Court of Appeals, the Commission's previous opinion and order in this case—to the extent that they dealt with respondents' practice of presenting spurious demonstrations in their television commercials—appear to have been wanting in the necessary clarity. Our opinion failed to spell out sufficiently the theory of law on which the order was based, and the prohibitions contained in the "demonstration" part of the order were not defined with sufficient precision. For that reason, it would clearly be inappropriate for the Commission to seek Supreme Court review of this case in its present posture. We believe it would be more orderly, less productive of delay, and in the public interest for the Commission now to remove the defects in its order found by the Court

of Appeals, so that if there should be occasion for further judicial review, it will not be clouded by uncertainty as to the basis and breadth of our decision.

On this remand the Commission has undertaken to reconsider the entire case, and to formulate a new order in light of the various suggestions contained in the opinion of the Court. These suggestions have been carefully considered by the Commission and in substantial part have been accepted and incorporated in our order. In one respect (relating to the application to Bates of that part of the order prohibiting misrepresentation of the qualities or merits of shaving cream products), we have added a protective qualification beyond that suggested by the Court.

# I.

At the outset, we must emphasize what this case does and does not involve. The basic facts have never been in dispute. Respondents, in their television commercials [fol. 53] for Rapid Shave, were not content merely to claim that its "super-moisturizing power" was so great that it could shave sandpaper. Had the commercials been limited to that claim, the case would have raised only the narrow factual issue of its truthfulness. Respondents saw fit to go much further and to "prove" the claim by "demonstrating" this purported quality of the product to the viewing public. Respondents were evidently aware that many viewers might not be willing to take their word for it that Rapid Shave could shave sandpaper. For those skeptical viewers, additional proof of the truthfulness of the claim was apparently thought necessary in order to sell the product. Respondents sought to exploit the popular belief that "the camera doesn't lie." By means of the "sandpaper test" demonstration, respondents in effect stated to the viewing public: "Do you doubt that Rapid Shave really can shave sandpaper, and suspect that we may be exaggerating its merits? Well, see for yourselves, and your doubts will disappear. Here is a piece of tough, dry sandpaper. Look at how quickly and cleanly Rapid Shave shaves it. And Rapid Shave can do the same for you, even if your beard is as tough as sandpaper."

As stated in our previous opinion, "The heart of these commercials was the visual 'sandpaper test'—a test that was, in reality, not taking place. . . . [T]he pictorial test of Rapid Shave, proving to any doubting Thomas in the vast audience that 'By golly, it really can shave sandpaper!', was the clinching argument made by the commercials. . . . Without this visible proof of its qualities, some viewers might not have been persuaded to buy the product."

Respondents did not present a fictional dramatization, obvious to viewers as such, of the claim being made for the product. Had they done so, an entirely different case would have been before us. But when a seller offers what he represents to be "documentary proof", he can [fol. 54] hardly claim the privilege of dramatic license. Respondents presented what appeared to viewers and was described as a "test" or visual proof, which each viewer could verify with his own eyes, of the truth of their claim that Rapid Shave's moisturizing qualities enabled it to shave tough, dry sandpaper cleanly and immediately upon lathering. In fact, however, the "sandpaper test" was a hoax; the "proof" was not proof at all; and the "demonstration" demonstrated only how far some marketers feel they can go in "hard sell" advertising. As respondents have freely conceded, the material they affirmatively represented in the "test" to be "tough, dry sandpaper" was not sandpaper but a mock-up of loose sand spread on Plexiglas.

## II.

Having put to one side the finding of fact that sandpaper cannot be shaved clean upon the application of Rapid Shave in the manner depicted and described in the demonstration, the Commission held that even if Rapid Shave could shave sandpaper as represented, respondents' "sandpaper test" demonstration, being spurious, was an unfair and unlawful method of advertising. We held that when an advertiser purports to prove the existence of a quality claimed for his product by staging a sham test or demonstration that actually proves nothing, and the "demonstration" is material in affecting the judg-

ment of buyers, the advertiser cannot defend the practice on the ground that the product in fact possesses the claimed quality.

In setting aside the Commission's order, the Court of Appeals held that it was susceptible of being interpreted to prohibit indiscriminately the use of mock-ups or substitute materials in all television commercials in every conceivable hypothetical situation. We agree that such an interpretation of our order would exceed its intended scope.

[fol. 55] The Commission did not have before it any abstract question whether the use of mock-ups in television advertising is, in all circumstances, *per se* illegal; or whether, in a casual or incidental display of a product that cannot be faithfully reproduced on the television screen because of technical deficiencies in the photographic process, it is permissible to use substitute materials to overcome those deficiencies. Rather, a distinction was sought to be drawn between mock-ups that are used in demonstrations designed to prove visually a quality claimed for a product and are thus material to the selling power of the commercial, and those that are not. We entirely agree with the Court of Appeals, for example, that there is nothing objectionable in showing a person drinking what appears to be iced tea, but for technical photographic reasons is actually colored water, and saying "I love Lipsom's tea", assuming the appearance of the liquid is merely an incidental aspect of the commercial, is not presented as proof of the fine color or appearance of the tea, and thus in no practical sense would have a material effect in inducing sales of the product.<sup>1</sup>

That the "sandpaper test" was calculated to affect the judgment of prospective buyers is beyond doubt. Respondents, who allocated so much of their television advertising

<sup>1</sup> We also agree with the Court of Appeals that where "products such as ice cream and the 'head' on beer melt under the hot camera lights and require the use of more stable substitutes", there could be no objection to the use of such substitutes in casual or incidental displays of the product, so long as the commercial does not seek thereby to prove visually the longevity or fine appearance of the product.



to these bogus demonstrations, cannot dismiss them now on the ground that they were so ridiculous that nobody could have been influenced by them to chose Rapid Shave over a competitor's product. As the Court of Appeals pointed out, respondents' advertising "went far beyond generalities and eye-catching devices into asserting as a [fol. 56] fact that the cream enables sandpaper to be shaved forthwith, and that this fact 'proved' the cream's properties for shaving humans. They cannot now suggest that ability to shave sandpaper forthwith was an irrelevant fact and an irrelevant representation. We agree with the Commission that it is immaterial that the cream may in fact have adequate shaving qualities. *If a misrepresentation is calculated to affect a buyer's judgment it does not make it a fair business practice to say the judgment was capricious.*" (Emphasis added.)

### III.

With this ambiguity in our order resolved, we shall restate the factual and legal basis for our conclusion that it is unlawful for advertisers to stage television commercial demonstrations that purport to—but do not in fact, because of the undisclosed use of mock-ups or substitute materials—prove visually a quality or merit claimed for a product, regardless whether the product actually possesses such quality or merit.

The principle upon which the Commission decided this case is elemental in the law of unfair competition: A seller may not resort to material falsehoods in order to induce sales of his product;<sup>2</sup> and a misrepresentation may

<sup>2</sup> In Section 15 of the Federal Trade Commission Act, in defining false advertising for the purposes of Section 12 of the Act covering foods, drugs, devices and cosmetics, Congress specifically spelled out the basic proposition underlying the whole Act that a false advertisement is one that is "*misleading in any material respect . . .*" (emphasis added). The validity of the complaint in this case, though expressly predicated on Section 5, may also be sustainable under Section 12, though the later is not specifically cited therein. Cf. *Williams v. United States*, 161 U. S. 382 (1897). There can be no question that an advertisement that is "false" under Section 12 also violates the more general and comprehensive provisions of Section 5. See Note, *The Regulation of Advertising*, 56 Colum. L. Rev. 1018, 1025, 1031, n. 73 (1956).

[fol. 57] be material in affecting a buyer's choice even though it does not relate to the product's quality or merits.<sup>3</sup>

The product may in fact be all that the purchaser thinks it to be; but if he has been induced to buy it by the sellers' fraud, injury is done both to the advertiser's competitors and to the public—which, through its representatives in Congress has established the fundamental principle of law that sellers in interstate commerce may not indulge in material untruths in their advertising.<sup>4</sup>

The original concept of the Commission's jurisdiction over false advertising, it may be noted, was limited to cases in which the advertising was found to be an unfair method of competition. See *FTC v. Raladam*, 283 U.S. 643 (1931); Handler, *The Jurisdiction of the Federal Trade Commission Over False Advertising*, 31 Colum. L. Rev. 527 (1931). While the Wheeler-Lea amendments to the Federal Trade Commission Act<sup>5</sup> established injury to consumers as an independently sufficient ground for finding a violation of Section 5, the basic proposition that advertising which is unfair to competitors violates the law has never been challenged.<sup>6</sup> If, relying on falsehoods told

<sup>3</sup> Among the cases illustrating this principle are those of false disparagement of a competitor's reputation, methods, or products, e.g., *Steelco Stainless Steel, Inc. v. FTC*, 187 F. 2d 698 (2d Cir. 1951); bait advertising, e.g., *Lifetime, Inc.*, Docket 7616, December 1, 1961; deceptive pricing, e.g., *Niresk Industries, Inc. v. FTC*, 278 F. 2d 337 (7th Cir. 1960) cert. denied, 364 U. S. 883 (1960); dishonest testimonials, e.g., *FTC v. Standard Education Society*, 86 F. 2d 692 (2d Cir. 1936), modified, 302 U. S. 112 (1937); and misrepresentation of the seller's trade status, e.g., *FTC v. Royal Milling Co.*, 288 U. S. 212 (1932), *Deer v. FTC*, 152 F. 2d 65 (2d Cir. 1945).

<sup>4</sup> See note 2, *supra*; see *National Trade Publications Serv. v. FTC*, 300 F. 2d 790, 792 (8th Cir. 1962).

<sup>5</sup> 52 Stat. 111 (1938), as amended, 15 U. S. C. 545(a)(1) (1958).

<sup>6</sup> In the very first case arising under the Federal Trade Commission Act, *Sears, Roebuck & Co. v. FTC*, 258 Fed. 307, 311 (7th Cir. 1919), the court stated that the Commission is "not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. The commissioners, representing the Government as *parens patriae*, are to exercise their com-

[fol. 58] them by a seller, consumers have been persuaded to buy his product, they may perhaps not be deceived or hurt in a strict pecuniary sense if the falsehoods did not relate to the quality or merits of the product. But such "deception" of purchasers is by no means essential to a finding of unfair competition. Regardless whether consumers are "injured" when they are induced to buy through false advertising claims, honest competitors are injured—because some or many of such sales have been made at their expense. And the Federal Trade Commission Act has enacted into law the fundamental concept that businessmen may not, in competing with each other for the consumer's dollar, resort to "unfair methods of competition in commerce and unfair \* \* \* acts or practices in commerce." Even apart from any moral or ethical considerations, Congress considered that such methods and practices must be outlawed in a competitive system where sellers should have fair and equal access to markets and where success should be the reward of the most efficient rather than the least scrupulous.

The Commission reiterates the basic principle that unscrupulous sellers and advertisers may not make misrepresentations that are material in inducing purchases. It is not enough for sellers to refrain from misrepresenting the merits of their wares; the law prohibits them [fol. 59] from making any material misrepresentations designed to influence the public in choosing what, or what not, to buy.

What is essentially involved in this phase of the case is the question whether an advertiser may lie to prospective buyers to convince them that certain real qualities of a product actually exist. Consider, for example, an advertisement for a product that falsely claims to have the "Good Housekeeping Seal of Approval". Surely it would not be a defense that the product in fact meets all the

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mon sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases."

standards required for that seal. Cf. *Hearst Magazines, Inc.*, 32 F. T. C. 1440 (1941).

Other familiar examples of the same principle are faked "before" and "after" photographs and forged testimonials in advertisements for products that in fact possess the claimed quality or merits. A diet food may be effective as an aid in weight reduction, but that would not justify use of counterfeit photographic "proof" in advertising it. A brand of milk may be wholesome and nutritious, but parents may not be urged to buy it for their children on the false representation that the President's children drink it. A toothpaste may be beneficial in reducing the number of cavities, but if statistical proof is offered of its effectiveness in actual use by particular families or other groups, the proof must be genuine.

In short, if people are led by misrepresentations to buy an advertised product, in preference to an honest competitor's it is not sufficient justification to say that the product actually possesses the claimed quality or merits. Allowance of such a defense would place a premium on false, and a penalty on honest, advertising. To say that selling is an art does not mean that artifice must be tolerated. If it is too difficult or even impossible in a particular medium to present a truthful demonstration proving a claim made for a product, the seller may be obligated to forego use of the demonstration form of advertising in that medium. There may indeed be some advertising [fol. 60] claims that simply cannot be proved in a television pictorial demonstration. Nonetheless, as stated in our previous opinion, it would be a cynical subversion of the policy of the law to allow technical limitations of a particular medium to become lawful justification for resort to falsehoods and deception of the public.

The Commission recognizes that the task of convincing prospective customers of the various qualities of a product represents a challenge to every advertiser. An advertiser, promoting a product which he believes the public would benefit from buying, may feel—perhaps on the theory that the end justifies the means—that there is no harm in telling some "white lies" in order to induce consumers to buy it, so long as the product's merits are

not misstated. But if a seller may indulge in falsehoods in order to do a more successful job of advocacy, then his competitors who are truthful in their advertising are put at a disadvantage. It would be ironical indeed if businessmen who do not resort to material deceptions in advertising their products were forced, as a result of a decision of the governmental agency responsible for enforcing truth in advertising, to do so or suffer competitively. As the Court of Appeals for the First Circuit observed in a recent opinion, *Korber Hats, Inc. v. FTC*, decided December 31, 1962, Congress "gave the Commission a broad mandate to prevent public deception in the give and take of the market place", and the "[c]ourts have consistently upheld the Commission's efforts to compel manufacturers and retailers to adhere to a high level of honesty in connection with their labelling and advertising habits". "The careless and the unscrupulous must rise to the standards of the scrupulous and diligent. The Commission was not organized to drag the standards down." *FTC v. Algoma Lumber Company*, 291 U. S. 67, 79.

[fol. 61]

#### IV. •

We consider, finally, the questions of (1) the applicability of the "demonstration" part of the order to all products advertised by Colgate, and (2) the responsibility of Bates.

(1) The Commission here found two unfair competitive practices, not one. The record showed that respondents went beyond misrepresentation of the qualities or merits of a particular advertised product. They used an unfair and unlawful method of advertising: staging fraudulent visual demonstrations purporting to prove a quality claimed for a product, but which do not in fact constitute such proof because of the undisclosed substitution of a mock-up. The illegality and unfairness in here in the "spurious demonstration" method of advertising, and do not depend on the particular products advertised.

The Court of Appeals recognized, without deciding, that if a certain type of advertising demonstration is unlawful,



"it might be appropriate . . . to enter a broad order forbidding all such demonstrations en masse." We think that the entry here of such a broad order is not only appropriate but, in the circumstances presented, our duty to the public and honest competitors under the Federal Trade Commission Act. It would be less than adequate protection of consumers and competitors to enjoin the use of this unfair method of competition (i.e., sham "demonstrations" that actually demonstrate or prove nothing) only insofar as it could be used in advertising one product, but not others. Respondents having been found to have engaged in that unlawful practice, the Commission was obliged to order them to stop it once and for all. If the function and purpose of a cease and desist order here are to halt respondents' unfair method of advertising, it would make no sense for the order to forbid them to stage spurious television demonstrations in advertising shaving [fol. 62] cream, but to allow them to continue the practice in advertising toothpaste or soap.

In respect to the prohibition against misrepresentation of the quality or merits of products, our previous order was narrowly limited to Rapid Shave and other shaving creams. In view of our findings as to respondents' misrepresentations in that regard, as well as the fact that respondents are already subject to a number of outstanding orders and stipulations containing similar prohibitions with respect to other products, the Commission would be

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In Docket 7737, June 1, 1960, Bates was ordered to cease and desist from using, in connection with the advertising of oleomargarine, "any pictorial presentation or demonstration purporting to prove, or representing in any manner, that moisture drops appearing on said oleomargarine cause such oleomargarine to taste more like butter, or to be more similar in flavor, than competitive oleomargarine."

In Docket 7688, February 24, 1960, Bates was ordered to cease and desist from using, in connection with the sale of filter cigarettes "any pictorial presentation or demonstration purporting to prove that the filter . . . absorbs or retains more of the tars or nicotine in cigarette smoke than the filter used in other cigarettes [when such is not the fact] . . ." and from representing that any filter cigarette has the approval of any agency of the United States Government



[fol. 63] amply justified in extending the prohibition against such misrepresentations to all products similarly advertised by respondents.<sup>5</sup> However, since our earlier order, though perhaps overly generous to respondents, has in this regard been reviewed and sustained by the Court of Appeals, we will not disturb the limitation to Rapid Shave or other shaving creams.

(2) Whatever may be the rule in a hypothetical case where there is an absence of any knowledge or suspicion on an agent's part that an advertisement is false, it is clear that this is not that case. It was Bates that conceived the idea of television commercials making the claim, and "proving it with a "sandpaper test" demonstration, that Rapid Shave could shave sandpaper." It was Bates that prepared and placed for broadcast on national net-

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or has been found by any such agency to be lower in tar or nicotine content than other filter cigarettes.

In Docket 7660, March 9, 1961, Colgate was ordered to cease and desist from representing, in connection with the sale of any dentifrice, "that said dentifrice affords the users thereof with complete protection against tooth decay . . . [or] misrepresenting in any manner the degree or extent of protection against tooth decay" . . . afforded users of any such dentifrice."

In Stipulation 8380, October 9, 1952, Colgate agreed to cease and desist from representing that "FAB washes clothes as clean without rinsing as with rinsing . . . [or that] . . . FAB without rinsing washes clothes cleaner than or as clean as soap with rinsing."

In Stipulation 2867, June 26, 1940, Colgate agreed to eliminate twelve representations concerning the qualities of Palmolive soap, two representations concerning the qualities of Cashmere Bouquet soap, five representations concerning the qualities of Super Suds, three representations concerning the qualities of shaving creams (including Rapid Shave), three representations concerning the qualities of dental cream, and one concerning the qualities of Kirkman Soap Flakes.

<sup>5</sup> See *Niresk Industries v. FTC*, 278 F. 2d 337, 343 (7th Cir.), cert. denied, 364 U. S. 883 (1960); *American Tack Co. v. FTC*, 211 F. 2d 239 (2d Cir. 1954); *Hershey Chocolate Corp. v. FTC*, 121 F. 2d 968, 971-72 (3d Cir. 1941).

<sup>6</sup> Proceedings before the hearing examiner, p. 85, testimony of Brantz M. Bryan, Jr., executive officer of respondent Bates. (Joint Consolidated Record Appendix, p. 65.)

work television, the commercials in question.<sup>10</sup> The record establishes that the responsible Bates officials knew that Rapid Shave could not shave sandpaper in the manner depicted and "proved" in the commercials. The record also establishes that it was this inability to shave sandpaper that led respondents to use a mock-up or artificial contrivance instead of real sandpaper in the visual "demonstration", wholly apart from any asserted technical photographic problems in reproducing sandpaper on the television screen.<sup>11</sup> While Colgate, as principal, is un-[fol. 64] questionably responsible for the advertisements broadcast on its behalf, it would be strange indeed if Bates, as the moving party in originating, preparing, and publishing the commercials, and having full knowledge not only that the claim was false but that the "proof" offered to the public to support it was a sham, should be relieved from responsibility.

On the facts of record, therefore, this is *not* a case of holding an agency responsible for advertising a false claim originated by its principal, where the agency was wholly without knowledge, or "any suspicion", of the falsity of the claim. So far as our order forbids Bates to disseminate spurious television commercial "demonstrations", the agency will necessarily know of the use of mock-ups in commercials which it itself prepares. And, so far as our order prohibits Bates from misrepresenting the qualities of Rapid Shave or other shaving creams, we shall include a specific provision allowing a defense where respondent shows that it neither had knowledge of the falsity of such a representation nor had any reason to question its truthfulness.

Pursuant to Section 4.22 (c) of the Commission's Rules of Practice, respondents will have twenty days to file exceptions to any provisions of the proposed new order, or to

<sup>10</sup> Answer to respondent Bates, p. 2. (Joint Consolidated Record Appendix, pp. 9-10.)

<sup>11</sup> Proceedings before the hearing examiner, p. 85, testimony of Mr. Bryan. (Joint Consolidated Record Appendix, p. 65.)

submit a proposed alternative form of order appropriate to carry out this decision.<sup>12</sup>

[fol. 65] Commissioners Anderson and Higginbotham concur in the result.

February 18, 1963.

<sup>12</sup> To avoid any possible misunderstanding of its position, the Commission emphasizes that its proposed order here would not prohibit *per se* the use of a mock-up in television commercials, e.g. where it precisely depicts a substance or material that cannot accurately be reproduced on the television screen. As we recognize in Point II, *supra*, the limitations of television photography might in some circumstances permit use of such a mock-up. But it is one thing to use a mock-up merely as a substitute for an article whose image becomes distorted when photographed; it is something entirely different to use the mock-up in a "test" or "demonstration" of the advertised product's claimed qualities, and to represent it as being the genuine article.

Thus, even if it be assumed in the instant case that Rapid Shave can in fact shave sandpaper, precisely as shown in the commercials, and that a mock-up was used only because real sandpaper cannot faithfully be reproduced on television, it misses the point to say that the commercials were therefore free from falsehood. Respondents did more than merely use a mock-up. They made an affirmative representation that was false, namely, that they were presenting an actual test and giving actual proof of Rapid Shave's ability to shave real sandpaper, and that in the test real sandpaper was being used. The misrepresentation would not have been greater or more material, but only more explicit, if the announcer had stated: "this test is being made on real sandpaper, and not an artificial mock-up contrived to look like sandpaper." The point is, whatever the technical photographic reasons justifying use of a mock-up, there could be no justification for the false presentation to the public of "proof" that in fact was not proof.

[fol. 66]

BEFORE THE  
FEDERAL TRADE COMMISSION

Docket No. 7736

IN THE MATTER OF  
COLGATE-PALMOLIVE COMPANY, a corporation, and  
TED BATES & COMPANY, INC., a corporation.

EXCEPTIONS AND STATEMENT OF RESPONDENT COLGATE-  
PALMOLIVE COMPANY TO PROPOSED FINAL ORDER.—  
filed April 15, 1963

This statement of exceptions and supporting reasons is filed by respondent Colgate-Palmolive Company ("Colgate") pursuant to the Commission's orders, issued February 18, 1963 and March 20, 1963.

This matter is on remand from the Court of Appeals for the First Circuit. The Court entered a decree on November 20, 1962 setting aside the Commission's first order and directing that further proceedings be in accordance with the Court's opinion filed that day. It is respectfully submitted that the Commission's second opinion and Proposed Final Order are improper for failure to conform to the Court's decree and for additional reasons hereinafter set forth.

[fol. 67]

I.

THE PROPOSED ORDER IMPROPERLY FAILS TO CONFORM  
TO THE MANDATE OF THE COURT.

It is fundamental that an agency must obey the rulings of a Court of Appeals. See *e.g.*, *Morand Bros. Beverage Co. v. NLRB*, 204 F. 2d 529, 532 (7th Cir. 1953), *cert denied*, 346 U. S. 909 (1953):

"The pronouncements of the reviewing court are then known in the vernacular as 'the law of the case', *i.e.*, they are the rules to govern the particular dis-

pute at hand. In such a situation it behooves the inferior to exercise great care that the law of the case is applied to the facts of the case when they have been precisely determined by it. This is so even when it finds itself in well founded disagreement with its reviewer.

"... In short, experience has taught that causes are disposed of most expeditiously when the correction of errors is left to the superior tribunals and those enjoying judicial or administrative inferiority studiously endeavor to comply with the mandate issued to them."

Moreover, Section 5(i) of the Federal Trade Commission Act provides that

"If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, ... then the order of the Commission *rendered in accordance with the mandate of the court of appeals* shall become final on the expiration of thirty days from the time such order of the Commission was rendered. ..."

[fol. 68] The Court of Appeals ruled that the use of a sandpaper mock-up by Colgate was not itself a material deception (310 F. 2d at 93-94), and that the Commission's order was permeated with a "fundamental error" in being based upon a finding of an illegal "method" or "practice" which the Court had "undercut" (*ibid.*). The Court, holding that "respondents' only offense was the making of a single misrepresentation about a single product", directed the Commission's attention to "the scope to be applied to single misrepresentations" (*id.* at 94-95).

The Commission did not seek a writ of certiorari, nor did it request reargument from the Court. Instead, it issued a second opinion and the Proposed Final Order herein excepted to. Colgate excepts to the Commission's failure to obey the Court. Colgate also excepts to the Commission's undertaking to "reconsider the entire case" as a device by which the Commission has done no more

than reargue its mock-up doctrine without permission of the Court of Appeals.

**A. *The Commission's Views on Mock-Ups Were Squarely Overruled.***

In its initial opinion, the Commission had set forth its position on the use of a mock-up in this case as follows:

"Assuming that there was no misrepresentation as to the effectiveness of 'Rapid Shave' in shaving sandpaper, was there nonetheless a misrepresentation in the visual demonstration offered as proof of such effectiveness? Specifically, was it deceptive to the public and an unfair advertising practice for respondents to conduct a 'sandpaper' test before the viewers' eyes to prove the product's 'super-moisturizing power' on what was represented as sandpaper, and what the viewers had every reason to suppose was sandpaper, but was actually a plexiglass mock-up?" (Joint App. 185).

[fol. 69] "The heart of these commercials was the visual 'sandpaper test'—a test that was, in reality, not taking place. This would be deceptive and unfair advertising even if 'Rapid Shave' was as effective in shaving sandpaper as respondents represented" (Joint App. 190-91).

"The difference in all these cases is the time-honored distinction between a misstatement of truth that is material to the inducement of a sale and one that is not" (Joint App. 196).

The Court flatly overruled the Commission. It held:

"We, of course, agree with the Commission that there is a misrepresentation of a sort, in any substitution case. But we are unable to see how a viewer is misled in any material particular if the only untruth is one the sole purpose of which is to compensate for deficiencies in the photographic process. The Commission has put the shoe on the wrong foot. What the viewers are interested in, and moved by, is what they see, not by the means. . . .



"[W]here the only untruth is that the substance [the viewer] sees on the screen is artificial, and the visual appearance is otherwise a correct and accurate representation of the product itself, he is not injured. The viewer is not buying the particular substance he sees in the studio; he is buying the product. By hypothesis, when he receives the product it will be exactly as he understood it to be. There has been no material deceit" (310 F. 2d at 93-94).

It is submitted that it is not now open to the Commission in this proceeding to defy the Court and once more advance the contention that "... it is unlawful for advertisers to stage television commercial demonstrations that purport to—but do not in fact, because of the undisclosed [fol. 70] use of mock-ups or substitute materials—prove visually a quality or merit claimed for a product, regardless whether the product actually possesses such quality or merit" (Second Op., p. 5). The Commission was overruled precisely as to this fundamental legal conclusion: the newly-proposed order thus is "undercut" as basically as the order set aside by the Court.

Further exception is taken to the Commission's argument that it is not precluded by the Court's ruling because the Court misunderstood the Commission's views:

"In setting aside the Commission's order, the Court of Appeals held that it was susceptible of being interpreted to prohibit indiscriminately the use of mock-ups or substitute materials in all television commercials in every conceivable hypothetical situation" (Second Op., p. 4).

We are unaware that the Court made such a holding. In any event, however, the Commission has overlooked a fundamental fact. Its first order and its proposed order prohibit the use of mock-ups (whatever the scope of the proscription) as a result of the Commission's underlying conclusion that the mere use of a sandpaper mock-up in this case was itself a violation of law (Joint App. 185, 190-91, 193). That conclusion as to the facts in this case was the basic issue before the Court when it considered

the mock-up question. The Court's opinion makes clear that it addressed itself to that issue:

"In its opinion accompanying the order the Commission stated that one of the issues was whether, *even if the cream permitted the shaving of sandpaper precisely as pictured*, there was 'nonetheless a misrepresentation \* \* \* and an unfair advertising practice'. The Commission resolved this issue by concluding that it was 'an illegal practice,' and was [fol. 71] likely to deceive the public and cause purchasers to buy what otherwise they would not have bought" (310 F. 2d at 93).

The Court thereupon squarely held the Commission's conclusion to be in error: that is one factor in this case as to which there is no ambiguity whatsoever. The Court fully understood and fully rejected the Commission's contention that the sandpaper mock-up used in this case was itself illegal—and the Court thereby undercut any present claim by the Commission that it may properly bar Colgate from the use of mock-ups if the scope of the prohibition is ostensibly narrowed.

#### B. *The Proposed Order Violates the Court's Decree.*

The Court held that "Respondents' only offense was the making of a single misrepresentation about a single product" and directed the Commission's attention to the proper scope or orders to be applied to single misrepresentations (310 F. 2d at 94).

The first paragraph of the proposed order is expressly based on a claimed illegal "practice"—"sham 'demonstrations'" (Second Op., p. 10). The proposed order thus openly violates the Court's ruling that no "practice" had been shown and the Court's direction that the order be shaped to a single misrepresentation about a single product.

The second paragraph of the proposed order is equally violative of the Court's decree.\* Although the Commission

\* So, too, is the preamble of the proposed order in referring to "methods", "acts" and "practices", directly contrary to the ruling of the Court.

states that the second paragraph of its initial order had been "reviewed and sustained by the Court of Appeals" (Second Op., p. 12), it points to nothing in the Court's opinion to justify such a conclusion. It is submitted, [fol. 72] rather, that the Court ruled to the exact contrary. Far from preserving that paragraph, the Court expressly stated that "we think it best that an *entirely* new one [order] be prepared" (310 F. 2d at 94).

The Court emphasized that the only appropriate order would be one directed toward a single misrepresentation of a single product. Despite this, the Commission's second opinion states that the second paragraph of its proposed order is drafted "in view of our findings as to respondents' *misrepresentations*" in regard to the quality or merits of products (Second Op., p. 11); the Commission thus admits that the paragraph is aimed at more than a single misrepresentation of a single product—and thereby openly defies the Court.

The Court, moreover, specifically referred the Commission to the Commission's own action in the *Gardol* matter (Docket No. 7660) (310 F. 2d at 95). The *Gardol* order was addressed to the degree or extent of protection against tooth decay or cavity development, the claimed misrepresentation having involved a matter within that specific area. If a comparable order in this case were to be extended beyond the exact parallel of the moisturizing effect of Palmolive Rapid Shave on sandpaper and other non-human substances, it would also embrace, at most, the moisturizing properties of Palmolive Rapid Shave on the human beard—not the sweeping prohibition proposed by the Commission.

It is submitted that the second paragraph, like the first, results from the Commission's rigid doctrine that—regardless of the decree of the Court of Appeals—Colgate violated the law in its use of the sandpaper mock-up. It is submitted, further, that the Court of Appeals foreclosed the Commission from applying that doctrine to the respondents in this case.

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[fol. 73] Colgate must therefore except to the Commission's failure to obey the Court of Appeals—and specifically to the preamble and each paragraph of the proposed order.

## II.

### PROPOSED ALTERNATIVE ORDER.

Colgate proposes an alternative form of order. It is submitted that its proposed order would be the order entered by the Commission if the Commission gave effect to the direction of the Court of Appeals. Incidentally, it also conforms to the Commission's own precedents.

#### A. *Breadth of the Order.*

The Court of Appeals directed that the order be framed in the light of the usual standard to be applied where there has been a single misrepresentation of a single product. It is therefore submitted that the order should be limited to Palmolive Rapid Shave or any other aerosol shaving cream having substantially the same composition.

As so limited to type of product, the order should cover the single quality or property of the product which was allegedly misrepresented.\* Technically, the order could justifiably be limited to the extent of Rapid Shave's moisturizing effect on sandpaper or other non-human substances. We propose, however, to reduce the area of controversy and thus proscribe a category of misrepresentation rather than the precise violation found. Accordingly, [fol. 74] Colgate's proposed order embraces representations concerning the effectiveness of Rapid Shave's moisturizing properties on any substance, including the human beard.

The Commission has instead embraced all products of respondent in its proposed first paragraph and all misrepresentations in its second for the reason, already noted,

\* See, for example, the statement made by Commissioner Elman in *Quaker Oats Co.*, Docket 8119, CCH Trade Reg. Rep. ¶ 15858 (April 25, 1962) that the Commission "tailors the order to the particular type of misrepresentation found."

It may be noted that each paragraph of the order proposed by the Commission improperly fails to confine itself to moisturizing properties, the only category of misrepresentation involved in this case.

that the Commission refuses to obey the Court of Appeals in its ruling on the sandpaper mock-up.

Even if the mock-up question were not now a closed issue, the Commission's proposed order would still be indefensible.

1. In the first place, the Commission—despite its stated intention—has offered nothing new in support of its mock-up doctrine. Colgate therefore respectfully refers to its briefs before the Court of Appeals as the basis for its exceptions to each one of the Commission's arguments made in its second opinion in attempted justification of its recalcitrance\* (pp. 12-13, 25-28 of Colgate's initial brief and pp. 4-5, 11-14 of its reply brief).

2. In the second place, the Commission has displayed a remarkable unwillingness to shape an appropriate remedy to the facts—whether or not the Court of Appeals had rejected the mock-up doctrine and directed the entry of a narrowly-confined order. The Commission has ignored a number of considerations which dictate a narrow order:

(a) Colgate's commercials made outright claims about the excellent moisturizing properties of Palmolive Rapid Shave for use in shaving on the human beard—the use for which the product is purchased. These claims have never been questioned by the Commission at any stage of this proceeding.

[fol. 75] (b) The mock-up doctrine of the Commission was unprecedented and contradicted previously-announced Commission policy (See Colgate's initial brief to the Court of Appeals at p. 26 and its reply brief at pp. 12-13).

(c) Other than the mock-up doctrine, the Commission could find a violation of the Act only by making findings as to issues which it had ruled on the motion to amend to be "additional or collateral"—findings which spelled out at most an exaggeration of the coarseness of sandpaper and the interval after application of Palmolive Rapid Shave to sandpaper; the violation thus found was one of degree and had nothing to do, in any event, with the qualities of Palmolive Rapid Shave in actual use for shaving of the human beard.

\* The statement by the Commission as to what the record "establishes" (p. 13) is excepted to as unsupported by the record.



(d) The complaint had been dismissed by an experienced Hearing Examiner after hearing.

(e) Colgate had discontinued the use of the contested commercials after receipt of the complaint.

(f) Any order of the Commission involves a penalty of up to \$5,000 a day for each violation. An advertiser subjected to a very broad order, at a time when its competitors were not, would be operating under a genuine handicap if the order were not sufficiently precise to make possible a confident prediction of its meaning and if it forbade behavior which a respondent's competitors were free to undertake.

These considerations demonstrate that the Commission should have reached the same result decreed by the Court of Appeals without the need for such decree.

#### *B. Clarity of the Order.*

Colgate's proposed order conforms to the standard laid down by the Court of Appeals and is relatively clear and precise—at least insofar as it is humanly possible [fol. 76] to draft language in this area of the law which permits reasonable prediction of its scope and meaning. (See *FTC v. Henry Broch & Co.*, 368 U. S. 360, 367-68 (1962).)

In contrast, the Commission's proposed order not only defies the Court of Appeals but is improperly vague and ambiguous. The meaning of "test or demonstration" in the Commission's proposed first paragraph is wholly unclear. Nowhere does the opinion attempt to spell out the content of these words, except as there are hints that they are to be given broad application; for example, at pages 4 and 5 of its second opinion, the Commission refers to the iced tea example in a manner indicating that if the appearance of the liquid were anything but incidental to the commercial, the order might be violated even though a formal test or demonstration were not being conducted. By the same token, in the footnote at page 5 the opinion refers to ice cream and beer "head" mock-ups in other than incidental use as violating its mock-up doctrine. (The Commission apparently found other examples used by the Court, i.e., the appearance of rich cream and a physical reproduction of an endorsement, as too difficult of exege-



sis.) It is submitted that a respondent advertising on the brink of penalties of \$5,000 a day is entitled to guidelines which are a good deal more clear. (See *FTC v. Henry Broch & Co.*, *supra*.)

The ambiguity is not inherent merely in the definition of a test or demonstration. It also carries over to other portions of the first paragraph which refer to "actual proof" of a claim made for a product. The difficulty here is that the Commission's second opinion seems to indicate that a representation may be made by implication. This appears to be the tenor of the second paragraph of the Commission's footnote 12 at page 14 of its opinion. It also is indicated by the Commission's discussion of the iced tea example: it is not at all clear from that discussion when the "appearance" of the liquid would be considered an [fol. 77] incidental aspect of the commercial, nor does the opinion spell out the manner in which the Commission would treat an argument that in smacking his lips the actor drinking colored water could be alleged to be representing and proving that Lipsom's Tea had excellent flavor.

The second paragraph of the proposed order is ambiguous and vague for other reasons. It prohibits the claiming of "qualities or merits that the product does not in fact possess"—a prohibition which is merely a paraphrase of the second paragraph of the order initially proposed by the Commission which had used the language "misrepresenting in any manner the quality or merits" of a product. As to the latter standard, when applied to a range of products, the Commission found in its initial opinion:

"So broad and indefinite a command would be most difficult to obey, even in the best of faith. . . ." (Joint App. 204-05).

It is submitted that such a "command" becomes no less indefinite when it is confined to a type of product.

### C. *Material Representations.*

The order should be limited to representations material to the inducement of a sale, a standard which the Commission's opinion recognizes to be valid and necessary (Second Op., pp. 4, 6, 7).

**D. Method of Representation.**

Colgate was found to have made its misrepresentation by only one means, that is, by a visual experiment on television employing a mock-up. Colgate does not ask, however, that the order be limited to the particular method of representation charged and found. It proposes that the order's coverage include relevant representations by any visual experiment whether or not on television and whether or not employing a mock-up.

[fol. 78]

**PROPOSED ORDER:**

"It is

"ORDERED that respondent Colgate-Palmolive Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of 'Palmolive Rapid Shave' or any other aerosol shaving cream having substantially the same composition, in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

"Misrepresenting, in any respect material to inducing the sale of any such product, the moisturizing qualities of that product through visual presentation of any experiment or test with the product, either alone or accompanied by oral or written statements, when the product does not have the moisturizing qualities so represented."

Respectfully submitted,

CAHILL, GORDON, REINDEL & OHL,

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New York 5, New York

Attorneys for Respondent Colgate-Palmolive Company.

Of Counsel:

ARTHUR MERMIN,  
CORYDON B. DUNHAM, JR.

April 15, 1963.

[fol. 79]

BEFORE

## FEDERAL TRADE COMMISSION

Docket No. 7736.

## IN THE MATTER OF

COLGATE-PALMOLIVE COMPANY, a corporation, and  
TED BATES & COMPANY, INC., a corporation.

EXCEPTIONS OF RESPONDENT TED BATES & COMPANY, INC., TO PROPOSED FINAL ORDER, STATEMENT OF REASONS IN SUPPORT OF EXCEPTIONS AND PROPOSED ALTERNATIVE FORM OF ORDER IN ACCORDANCE WITH THE MANDATE OF THE COURT OF APPEALS.—Filed April 15, 1963.

As authorized by the Commission's procedural order directing the filing of exceptions to the Proposed Final Order, and pursuant to Section 5(i) of the Federal Trade Commission Act, 15 U. S. C. § 45(i),\* respondent Ted [fol. 80] Bates & Company, Inc. submits its exceptions to the proposed order, a statement of reasons in support of its exceptions, and a proposed alternative form of order in accordance with the opinion and mandate of the Court of Appeals, entered on November 20, 1962 (see 310 F. 2d 89).

## I. Introductory Comment.

This administrative proceeding is in a unique posture. The Commission's Proposed Final Order and accompany-

\* Section 5(i) reads:

"If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected."

ing opinion make it clear that henceforth the dominant issue in this case will be the Commission's patent and defiant refusal to obey the mandate and rulings of the Court of Appeals for the First Circuit.

That Court's judicial review of the Commission's original decision fully and finally disposed of all substantive legal and factual issues in this case. The Court first sustained the Commission's ruling that the single product here involved did not have the moisturizing quality claimed in the challenged television advertising, that the claim was "material," and that the advertising therefore violated Section 5 of the Federal Trade Commission Act (310 F. 2d 89 at 91-92):

The Court explicitly proceeded, as was necessary, also to reverse the Commission's determination that television advertising which makes a truthful claim for a product in a test or experiment nevertheless violates Section 5 merely because the test or experiment shown on television used a mock-up or prop instead of the product, or instead of the substance represented as being used to test the product (*id.* at pp. 93-94).

Finally, the Court ruled that any order the Commission might enter on remand could treat only the single advertising representation found to be unlawful (p. 94); and that as to respondent Bates, the order must include a provision conditioning future liability for violation upon Bates' knowledge as to the falsity of the advertisement (p. 94).

[fol. 81] These rulings of the Court were fully apparent from its judgment. Embodied in a clear mandate at the close of its opinion, that judgment reads (p. 95):

*"Judgment will be entered setting aside the order of the Commission. Further proceedings to be in accordance with this opinion". (Emphasis in original opinion.)*\*

The contrast in the reactions of the respondents and of the Commission to the mandate and the rulings of the Court is striking. Respondents accepted the first ruling, as to which the Commission had prevailed. But the Com-

\* The Court entered a decree in the same terms.

mission, while not timely requesting further judicial review, as it might appropriately have done, now belatedly proposes to reject essentially all the rulings of the Court that were adverse to it. Even though the Commission is under a statutory duty to follow the decision and mandate of the Court in this case, its rejection is boldly voiced as a sharp challenge to the Court as well as to the respondents. It is stated, *first*, in a Proposed Final Order which embodies the same broad product coverages and in substance the same sweeping prohibitions against mock-ups as those which the Court pointedly refused to sustain, and, *second*, in an "opinion on remand" which reargues the Commission's legal theory as to the meaning of Section 5 that the Court considered and squarely rejected in this proceeding.\*\*

[fol. 82] Respondent Bates believes that its acceptance of the Commission's proposed new order would mean surrender of its basic rights under Section 5 of the Act that the Court of Appeals found in its favor; and, further, that acceptance of the proposed new order would destroy the integrity of the Court's decision which is the law of the case in this proceeding.

We are compelled therefore vigorously to protest the Commission's Proposed Final Order which is plainly and patently at odds with the mandate and the rulings of the Court. We are compelled further to oppose the attempt of the Commission to reargue its legal position in its new opinion. That reargument is wholly unwarranted in law, is repetitious of the Commission's prior opinion, and serves no lawful purpose at this juncture—when the only issue properly before the Commission is the formulation of an appropriate order in accordance with the mandate of the Court. See Section 5(i), Federal Trade Commission Act, 15 U. S. C. § 45(i).

\*\* The statement in the Commission's opinion (p. 2) that it "has undertaken to reconsider the entire case" can mean no more than that, in purporting "to formulate a new order in the light of the various suggestions contained in the opinion of the Court," it is in reality attempting to reargue to the Court its views on the use of mock-ups to present a truthful product claim. That point was considered and decided by the Court. The Commission did not petition for rehearing. Compare *Carr v. Federal Trade Commission*, 302 F. 2d 688, 691-93 (1st Cir. 1962).



Respondent, therefore respectfully urges that the Commission reconsider its proposal and formulate a new order in light of the specific rulings of the Court of Appeals and in accordance with its mandate as required by law.\*

\* Both fairness and efficiency in the administration of justice require that the decision and mandate of an appellate court control the further proceedings by a lower tribunal to which a case is returned. The Supreme Court expressed this axiom of judicial procedure as early as 1838 in language that permits no misunderstanding:

"Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; nor give any other or further relief; nor review it upon any matter decided on appeal, for error apparent; nor intermeddle with it, further than to settle so much as has been remanded. . . . [A]nd on a subsequent appeal, nothing is brought up but the proceedings subsequent to the mandate." *Sibbald v. United States*, 12 Pet. (37 U. S.) 488, 492.

The rule has remained unchanged through the years. *E.g.*, *United States v. Haley*, 371 U. S. 18 (1962); *In re Potts*, 166 U. S. 263 (1897); *In re Sanford Fork & Tool Co.*, 160 U. S. 247 (1895).

Beyond challenge, the rule is as controlling of the action by a district court or by an administrative agency that has been directed to proceed on remand in accordance with the mandate and ruling of a federal court of appeals in the same case. *E.g.*, *Lewis, Roca, Scoville & Beauchamp v. Christenson*, 263 F. 2d 536 (10th Cir. 1959); *Morand Bros. Bev. Co. v. National Labor Relations Board*, 204 F. 2d 529 (7th Cir. 1953); *cf. Romm v. Commissioner of Internal Revenue*, 255 F. 2d 698 (4th Cir. 1958). In the *Morand Bros.* case, *supra*, the Court of Appeals for the Seventh Circuit took the Labor Board to task for its opinion on remand criticizing the court's view of the law; the court stated:

"The pronouncements of the reviewing court . . . are the rules to govern the particular dispute at hand, unless, of course, the decision of the reviewing court is declared erroneous by a tribunal of competent jurisdiction holding a still more superior position in the judicial pyramid. . . .

In short, experience has taught that causes are disposed of most expeditiously when the correction of errors is left to the superior tribunals and those enjoying judicial or administrative inferiority studiously endeavor to comply with the mandate issued to them." 204 F. 2d 532.



[fol. 83]

## II. Exceptions to Proposed Final Order and Statement of Supporting Reasons.

Respondent's specific exceptions to the Commission's order directed against it, and its reasons why the order is not in accordance with the Court's mandate, may conveniently be stated separately as to each of the two numbered paragraphs of the proposed new order.

### PARAGRAPH 1.

*A. Use of Mock-ups or Props in Television Advertising Tests or Experiments.* It is obvious that the Commission has rewritten paragraph 1 of its old order in a purported attempt to dispel what were inescapable ambiguities and inconsistencies. But it is equally obvious that the Com-[fol. 84] mission lacks authority in this case to enter any order—however phrased—that prohibits television advertising of a product by a test or experiment merely because the advertising uses mock-ups or props, and not the product itself or other substances shown.

If the decision of the Court of Appeals is to have any meaning at all, it must mean that much. Moreover, we suggest that the Commission has failed even to accomplish its stated purpose. Although now grammatical and employing different and seemingly meaningful words, the new paragraph in fact compounds the ambiguities of the prior order, particularly when it is read together with the Commission's further explanatory opinion.

For these reasons, respondent Bates excepts to the entire paragraph 1 of the Commission's Proposed Final Order.

1. Respondent Bates believes that the sole issue properly before the Commission is, as already stated, the entry of an order in accordance with the mandate of the Court of Appeals. We do not, therefore, treat at length the Court's decision as to the lawfulness of the use of mock-ups in television advertising. Suffice it to say that there is no warrant for the Commission's attempt to reargue the merits of this issue, which it lost, by urging that the Court

of Appeals may not have fully understood the Commission's legal position.

The Court's opinion makes crystal clear that it did fully understand. Although recognizing that the use of a mock-up involves "a misrepresentation, of a sort," the Court held that viewers were not "misled in any material particular" by the use of mock-ups (310 F. 2d at 93). The Court later again declared that "where the only untruth is that the substance [the consumer] sees on the screen is artificial, and the visual appearance is otherwise a correct and accurate representation of the product itself, he is not injured" (*id.* at p. 94), and there is accordingly no violation of law. Throughout, moreover, the Court addressed itself precisely to the issue phrased in the Commission's prior opinion and to the prohibitions against mock-ups contained in paragraph 1 of its prior order:

"... [W]hether mock-ups or simulated props may lawfully be used in television commercials to demonstrate qualities claimed for products, where the audience is told that it is seeing one thing being demonstrated while actually it is seeing something different." (Prior opinion of the Commission, Tr. 194; see 310 F.2d at 93, n. 6.)

Clearly, therefore, wholly apart from questions of language, paragraph 1 of the Commission's order cannot stand. In the Court's own words, its decision had "undercut the basis for any such order" (310 F. 2d at 94).

2. The Commission's new proposal is on no better footing as an attempt to phrase a paragraph 1 that would both control the use of mock-ups and speak in clear and understandable terms to a respondent who is faced with the ever-present danger of substantial penalties for violating a Commission order. The Commission's lengthy explanations of its new proposed paragraph 1 apparently were thought necessary to an understanding of its terms, but in fact they provide little real assistance.

The Commission first writes a gloss on the words "actual proof" by defining "fictional dramatizations" out of paragraph 1 (Opinion, p. 3). Television advertising that makes a truthful claim as to a product's qualities, the

Commission appears to be saying, could lawfully use mock-ups so long as the advertising comes within this newly suggested permissible area, which is now for the first time offered but yet remains unclarified by the Commission.

It would appear, from what the Commission has said, that its new paragraph 1 permits the use of mock-ups at least in televised "animated" tests or experiments, which [fol. 86] typically employ drawings or sketches rather than real actors or real products or other actual substances. The Commission, however, does not indicate why such dramatizations would be any less convincing to the viewer than other tests or experiments shown on television.\*

Elsewhere in its opinion the Commission contradicts itself almost in the same breath in further interpretations of its proposed new paragraph 1. It envisages, for example, a clear line between "casual or incidental displays" of a product in commercials and what it believes to be advertising claims that are essential to selling the product. The Commission suggests that a television commercial may permissibly show an actor who states that he "loves Lipsom's tea," and that the commercial may lawfully use colored water instead of tea so long as the actor

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\* The irrationality of the distinction the Commission advances may be illustrated by a hypothetical commercial. An advertiser might attempt to persuade consumers to buy nylon rope or cord, instead of a product composed of some other fibers, by claiming that nylon has greater tensile strength. That claim in fact is true. The commercial might show that heavy nylon ropes, tested by break-strength machines, sustain a far greater load without breaking than comparable ropes made of the other fibers. Yet, to assure that the test shown is safely conducted, or perhaps because the testing machines needed are too heavy or too bulky for a television studio, mock-ups are used.

Can it make any conceivable difference to a television viewer if the test is represented in animated form or as a test in real life? More fundamentally, can it make any conceivable difference to the viewer that mock-ups are used if the nylon rope in fact performs as the commercial represents? To both questions, we answer that it cannot. Even if the use of mock-ups were open under the Court's mandate in this case, we submit that these fundamental inquiries, which arise again and again to plague one's common sense when any rational attempt is made to apply the Commission's order, have never been and are not answered satisfactorily by the Commission.

does not mention the liquid's fine appearance (Opinion, p. 4). Or, the Commission says, mock-ups may be used to show ice cream and the "head" of beer if no attempt is made to sell the product by proof of its "fine appearance" (*id.* at p. 5, n. 1).

[fol. 87] The Commission's distinctions, we respectfully suggest, are illusory, imaginary, and unreasonable as a directive for future conduct by a respondent subject to cumulative civil penalties. Television advertising sells a product in an endless number of contexts by displaying it in a way that is attractive to the viewer. However the Commission may attempt to explicate the language of the new paragraph 1, its crippling impact upon this dominant aim of all advertising of a product cannot be rectified. One who uses television to sell beer or ice cream—or anything—generally does so by pointing to the product's "fine appearance" or other attractive qualities. This simple act will frequently require the use of mock-ups; yet it is precisely what the Commission's order would proscribe. The Commission, in short, would bar all advertisers and advertising agencies from using mock-ups in the key situations in which they are most required by television as a communications medium.\*

In the last analysis, these harsh realities are bluntly recognized by the Commission itself. Its new opinion (p. 9) echoes its broad earlier pronouncement (Tr. 195) that if mock-ups must be used even to make a truthful claim for a product, "the seller may be obliged to forego use of the dramatization form of advertising" on television. This stark conclusion is reached, however, without there having been any showing by the Commission of an

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\* That this is the sweep of paragraph 1 is also suggested by the Commission's Parthian footnote (Opinion, p. 14, n. 12). The Commission there first states that its proposed new order would permit use of a mock-up "where it precisely depicts a substance or material that cannot accurately be reproduced on the television screen." But this gloss—on what the order itself does not provide—is further elaborated. The Commission next declares that even such a mock-up may not be used "in a 'test' or 'demonstration' of the advertised product's claimed qualities, and to represent it as being the genuine article." These remarks by the Commission abundantly confirm the inherent ambiguities in paragraph 1.

[fol. 88] "equivalent need" for such a "drastic remedy." See 310 F. 2d at p. 94, n. 8. Even if the issue were still open under the Court's ruling in this proceeding, certainly the record does not justify an order which would—as paragraph 1 does—effectively bar television mock-ups altogether when they are used to make truthful product claims by means of tests or experiments. As the Court of Appeals stated in expressing its rejection of the Commission's view of the law (310 F. 2d at 94, n. 9): "It is difficult to think the Commission [has] fully appreciated the principle it has espoused."\*

**B. Product Coverage.** The Court of Appeals explicitly directed the Commission to apply only to the type of product involved in this case whatever substantive prohibitions against false and misleading advertising the Commission's order might properly contain. The ruling of the Commission that was upheld, the Court stated, involved only a finding as to a "single misrepresentation about a single product" and the Commission is "well aware of the scope [of an order] to be applied to single misrepresentations . . ." (310 F. 2d at 94). See also *Korber Hats, Inc. v. Federal Trade Commission*, 311 F. 2d 358, 363-64 (1st Cir. 1962). The Commission's order, we submit, may therefore reach only the specific product here involved or any other aerosol shaving cream having substantially the same composition.

The Commission's arguments to sustain an order reaching "any products," as the order applies to mock-ups or props, are both unpersuasive and wholly inaccurate.

[fol. 89] 1. The Commission first states (Opinion, p. 10) that the use of a mock-up in the challenged television advertisements constituted one of two "unfair competitive

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\* For example, as we inquired in the Court of Appeals, we inquire again of the Commission now: Must respondent "henceforth actually and repetitively use products such as depilatories, first-aid preparations and sunburn remedies, and employ actors who in fact currently need the application of such products, when it undertakes to prepare advertisements that will sell their qualities or merits? Must one, for example, lacerate an actor before demonstrating the application of a Band-Aid?" Reply Brief for Petitioner Ted Bates & Company, Inc., p. 16.



*practices*" and involved an "unlawful *method* of advertising" (emphasis added). The Court of Appeals, however, pointedly declared that because the use of mock-ups was not unlawful under Section 5, in this case or otherwise, the Commission had made "no showing of any single 'method' or 'practice' in the sense discussed by the Commission in its opinion" (310 F. 2d at 94). To the extent, therefore, that the Commission now relies upon having found an unlawful "method" or "practice" to buttress an order with broad product coverage, it is in square conflict with the decision of the Court of Appeals.\*

2. Nor can the Commission sustain its proposed broad product coverage with a partial and inaccurate quotation (Opinion, p. 10) from the decision of the Court of Appeals. Instead, the Court's language requires rejection of the unlimited product coverage the Commission would order.

The Court stated that had it ruled differently—had it ruled mock-ups to be "illegal per se" under Section 5—then a broad order forbidding "en masse" all use of mock-ups in demonstrations "might be appropriate." But the Court did not so rule; indeed, when it made the statement it had already expressly reversed the Commission on the controlling question of substantive law (310 F. 2d at 93-94).

The Commission's opinion, however, now inaccurately rephrases the Court's careful statement to read that "if a certain type of advertising demonstration is unlawful, 'it might be appropriate . . . to enter a broad order forbid-[fol. 90] ding all such demonstrations en masse'" (Opinion, p. 10; emphasis added). It then cites its own reformulation of what the Court said in an effort to support a new order with broad product coverage. The Commission's unwarranted reliance upon the word "if" is thus laid bare. Obviously, the key assumption underlying the

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\* The refusal of the Court to find an unlawful "method" or "practice" and the Court's statement that the "only offense was the making of a single misrepresentation about a single product" also require deletion of the reference to "methods of competition or . . . practices" that appears in the preamble to the Commission's Proposed Final Order.



Commission's "if" is negated by what the Court of Appeals held: The use of a mock-up was not illegal, per se or otherwise. That plain holding is the law of this case, and prohibits an order with the broad product coverage the Commission now proposes.

3. The Commission's proposed broad product coverage likewise conflicts with its own practice in advertising cases. Thus, in addition to *Colgate-Palmolive Co.*, Dkt. 7660, CCH Trade Reg. Rep. ¶ 29,445 (1961), which the Court of Appeals expressly relied upon, the Court could also have cited a list of recent cases that have fixed the Commission's far more narrow position on this matter. If the Commission is to fulfill its responsibility as an expert administrative agency, it has the duty to inform the respondents, and ultimately the Court, why it suddenly seeks to discard its established practices and to embrace in an advertising cease and desist order *all products* that the respondents might now or in the future advertise, or, as to an advertising agency, which that agency may in the future be employed to advertise for any principal. See, e.g., *The Mennen Co.*, Dkt. 8146, CCH Trade Reg. Rep. ¶ 15,133 (May 4, 1961); *Evelyn Miller*, Dkt. 8398, CCH Trade Reg. Rep. ¶ 15,451 (September 22, 1961); *Approved Formulas, Inc.*, Dkt. 8151, CCH Trade Reg. Rep. ¶ 15,301 (July 18, 1961); *Aluminum Company of America*, Dkt. 7735, CCH Trade Reg. Rep. ¶ 29,436 (March 4, 1961); *Eversharp, Inc.* Dkt. 7811, CCH Trade Reg. Rep. ¶ 29,094 (September 20, 1960); and *Lanolin Plus, Inc.*, 54 F. T. C. 446 (1957).

4. The Commission also seeks to support a broad product coverage by referring to prior consent orders involving [fol. 91] each respondent alone, and to one litigated order involving respondent Colgate alone (Opinion, pp. 11-12). It needs no elaborate argument to establish that what was previously determined as to one respondent, in a wholly different case to which another person was not a party, cannot lawfully be used to fashion an order against that person as a respondent in a later case.

Moreover, respondent Bates has already objected to the Commission's improper reliance, in violation of its own rules, upon prior consent orders to broaden the scope

of an order in any subsequent case.\* The Commission's reference to those prior proceedings was to no avail in the Court of Appeals, and it cannot assist the Commission now. We repeat: Consent orders explicitly state that the agreement "is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint". See Rules of Practice, § 3.3. The Commission's continued Andabatarian reliance on prior consent proceedings is therefore wholly misplaced; they do not support the entry of any order at all—much less an order with broad product coverage.

5. Lastly, the Court's decision specifically controls the scope of the Commission's order on another question that is related to product coverage. As to respondent Bates, the Court suggested that the Commission's prior order was improperly broad because its prohibitions were applicable "with regard to every customer" whom Bates might now or in the future serve as an advertising agency (310 F. 2d at 94). In light of the limited violation of Section 5 found by the Court, the Commission's order as to Bates must be narrowed to covered products "made, sold and advertised by respondent Colgate-Palmolive Company."

[fol. 92]

#### PARAGRAPH 2.

Two preliminary comments must precede the statement of respondent Bates' specific exceptions to paragraph 2 of the Proposed Final Order.

*First*, respondent disputes the Commission's conclusion that the Court sustained the comparable paragraph of the prior order "apparently in all respects" (Opinion, p. 2). The mandate of the Court of Appeals stated: "Judgment will be entered setting aside the order of the Commission" (310 F. 2d at 95). The Court did *not* enter a judgment "setting aside paragraph 1 of the order of the Commission and affirming paragraph 2."

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\* Brief of Petitioner Ted Bates & Company, Inc., in the Court of Appeals, p. 26, n.\*.

*Second*, respondent contends that the Commission's proposed paragraph 2 is, with the necessary modifications described below, the entire order that may be lawfully entered by the Commission in this case if the mandate and rulings of the Court are to be respected as required by the statute.

We turn now to our specific exceptions to paragraph 2. Thereafter, in the final portion of this memorandum, we set forth, as a revised paragraph 2 together with an appropriate preamble, a proper form of order to be entered by the Commission that would be in accordance with the Court's mandate and as required by Section 5(i) of the Act.

**A. Product Coverage.** For the reasons already stated in the consideration of paragraph 1 (pp. 16-18 above), paragraph 2 should be revised to embrace only "Palmolive Rapid-Shave" or any other aerosol shaving cream having substantially the same composition.

**B. Prohibited Representations—"Moisturizing Qualities."** Paragraph 2 should reach only representations as to the "moisturizing qualities" of the covered shaving cream products. The opinion of the Court, as already [fol. 93] noted, labelled the only offense properly found as involving "the making of a single representation about a single product" (310 F. 2d at 94). In describing that representation, the Court indicated that, in its judgment, it concerned solely the moisturizing qualities of the product (*id.* at pp. 90-92).

So limiting the scope of paragraph 2 would accord with the practice of the Commission in advertising cases. As Commissioner Elman has stated, dissenting in *Quaker Oats Co.*, Dkt. 8119, CCH Trade Reg. Rep. ¶ 15,858 (April 25, 1962):

"When the Commission finds that a respondent has falsely advertised its product in a particular way—*e.g.*, as to foreign origin—it does not issue an order prohibiting all known forms of misrepresentation or misrepresentation in general. It tailors the order to the particular type of misrepresentation found."

See also cases cited at p. 17 above.

We note in passing that our objection to the Commission's failure to limit paragraph 2 to representations about "moisturizing qualities" applies with the same, if not greater, force to the Commission's open-ended paragraph 1 dealing with mock-ups. Should the Commission persist, in defiance of the mandate of the Court, in entering any order with prohibitions against the use of mock-ups, that part of the order must apply only to claims as to the "moisturizing qualities" of the covered products. Were the point open under the Court's mandate, paragraph 1, therefore, would on any theory and at the very least, have to be modified to include the words "as to moisturizing qualities" after the words "actual proof of a claim."

C. *Prohibited Representations—By "Visual Experiments or Tests."* Paragraph 2 must be limited to representations as to the moisturizing qualities of the included shaving products by the presentation of visual experiments or tests with the product. The Court's opinion deals with a visual representation as to the quality of the product for use in shaving sandpaper. The Court discussed this quality in terms of what was "apparently shown" in the television test (310 F. 2d at 91); it referred to the characteristics of the sandpaper used in the "visual demonstration" (*ibid.*); and it repeatedly pointed to the effect of the representations on television viewers (*passim*). The opinion's emphasis on these "visual" aspects of the misrepresentation charged requires that paragraph 2 be limited to the "visual presentation of tests or experiments."

D. *Prohibited Representations—"Materiality."* The prohibitions of paragraph 2 may lawfully apply only to representations that are material to inducing the sale of the covered products. Although the Commission's opinion repeatedly acknowledges that advertising representations must be "material" before they may be held unlawful (*e.g.*, pp. 4, 6, 7), the Commission has not included language of materiality anywhere in its Proposed Final Order. The Court of Appeals also recognized that representations that may be found to violate the law must be

limited to those that mislead in a "material particular" or which involve "material deceit" (310 F. 2d at 93, 94). Verbal obeisance by the Commission is not enough. Paragraph 2 should state that the prohibited representations as to moisturizing qualities must be only those that are material to inducing the sale of the products the order affects.

*E. The Knowledge Required of Respondent Bates.* Respondent Bates excepts to the manner in which the Commission has treated the Court's direction that the future responsibility of Bates, the advertising agency, for violation of the order must be conditioned upon the reasonableness of its knowledge—its scienter—as to the falsity of [fol. 95] the advertising. The Court directed the formulation of an order that would afford respondent a realistic and meaningful degree of protection, given its limited capacity as an advertising agency. The Commission's proposal does not do so.\*

o The relevant portion of the Commission's paragraph 2 reads:

"unless respondent shows that it neither had knowledge of the falsity of such representation nor had any reason to question its truthfulness."

The Commission's formulation, we suggest, confuses and distorts what should be a simple matter.

In the first place, there is no warrant for making the scienter requirement a matter of defense to be raised and established by respondent in the future. It is the Commission itself which should be required, in any subsequent compliance proceeding, initially to adduce evidence that respondent had reason to know that the advertisement was false. The Commission will have that burden as to the other elements of the order, and we see no reason or

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\* The Commission apparently seeks to minimize the importance of the scienter provision to an advertising agency. Its opinion states at length that in this case respondent knew that the advertisement was false (Opinion, pp. 12-13). We submit that these statements, assertedly based on a new and unsupported reading of the record with which respondent strenuously disagrees, misconceive the purpose of a cease and desist order. It is axiomatic that any Commission order operates only to regulate a respondent's business conduct prospectively.



legal basis for transferring the burden to respondent in any future penalty action.

The substantive standard of knowledge the Commission would require of respondent is also improper. No detailed discussion is needed to demonstrate the vagueness and the uncertain meaning of the word "question" in the Commission's phrase "reason to question." At the most, respondent should be held only to a standard of reasonable care, and that standard is best articulated and far better understood with the words "reason to know." Respondent accordingly urges that the scienter provision of the order read as follows:

"when respondent knew or reasonably should have known that the product did not have the moisturizing qualities so represented." \*

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\* We have included the word "moisturizing" before the word "qualities" in keeping with our previously expressed position (p. 21 above) that the order may properly bar only representations as to "moisturizing qualities."

We must further note, *arguendo*, what will be another inadequacy of the Commission's treatment of the scienter issue if, in defiance of the decision of the Court, the Commission should persist in entering an order prohibiting the use of mock-ups. The Commission explained its failure to include a scienter provision in this portion of the Proposed Final Order on the ground that respondent "will necessarily know of the use of mock-ups in commercials which it itself prepares" (Opinion, p. 13).

This assumption, however, is unfounded in fact. It wholly overlooks business practices that are common place in preparing, producing and disseminating television commercials. Advertising agencies "prepare" a commercial only in the sense that they formulate it as a script or storyboard. The script or storyboard is then turned over to an independent television film-producing company which undertakes to "produce" the commercial on film or tape. Copies of this film or tape are thereafter distributed to television broadcasters who actually "disseminate" the commercial. Samples of the advertised product, or of other articles or substances to be used in producing the commercial, are often supplied by others, such as the independent film-producing company, or are purchased on the market. The film-producing company's producers, camera-men, prop men and other technicians also select the audio and video techniques that are necessary to produce a satisfactory film or tape for use on television.

To say that an advertising agency "will necessarily know of the use of mock-ups in commercials which it itself prepares" thus

[fol. 97]

### III. Respondent's Proposed Alternative Form of Order.

Respondent Bates submits the following proposed alternative form of order. For the reasons set forth above, respondent believes that the order is in accordance with, and is plainly required by, the mandate of the Court of Appeals.

"It is Ordered that respondent Ted Bates & Company, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in the advertising of 'Palmolive Rapid Shave' or any other aerosol shaving cream having substantially the same composition made, sold and advertised by respondent Colgate-Palmolive Company, in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

[fol. 98] "Misrepresenting, in any respect material to inducing the sale of any such product, the moisturizing

vastly and incorrectly oversimplifies a complicated technical process and tells very little of the whole story. Advertising agencies are no more equipped to undertake television film-producing than they are to perform the broadcast or dissemination process. The agency's job is to formulate the ideas and the script for the commercial, to recommend broadcast schedules and to check performance thereof by the broadcasters.

In these circumstances, the vagaries of application inherent in the Commission's new order—turning on such elusive notions as the exclusion of "fictional dramatizations" or "casual or incidental" displays of a product, yet including representations that deal with (or that may be "actual proof" of) the "longevity" or "fine appearance" of that product—certainly require that an advertising agency be taxed with responsibility only for what it knew or reasonably should have known.

Therefore, if the Commission's order should continue to prohibit the use of mock-ups, in defiance of the Court's mandate, a scienter clause such as the following must be included at the end of that part of the order:

"when respondent knew or reasonably should have known that the material or article used in the test or experiment was a mock-up or substitute material or article."

qualities of that product through visual presentation of any experiment or test with the product, either alone or accompanied by oral or written statements, when respondent knew or reasonably should have known that the product did not have the moisturizing qualities so represented."

Respectfully submitted,

JOSEPH A. MCMANUS

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JOSEPH A. MCMANUS

200 Park Avenue

New York 17, New York

H. THOMAS AUSTERN

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*Ted Bates & Company, Inc.*

*Of Counsel:*

COUDERT BROTHERS

COVINGTON & BURLING

April 15, 1963

[fol. 99]

\* \* \* \*

BEFORE THE  
FEDERAL TRADE COMMISSION

Docket No. 7736.

IN THE MATTER OF

COLGATE-PALMOLIVE COMPANY, a corporation, and  
TED BATES & COMPANY, INC., a corporation

STATEMENT OF COMPLAINT COUNSEL IN REPLY TO RE-  
SPONDENTS' EXCEPTIONS TO PROPOSED FINAL ORDER,  
STATEMENT AND PROPOSED ALTERNATIVE FORM OF  
ORDER—Filed April 25, 1963.

Respondents herein argue that the Commission's Proposed Final Order is not in accord with the mandate of the Court of Appeals for the First Circuit when on review that court set aside the Commission's order and remanded this matter to the Commission for it to write a new order. Their argument that the Commission ignored the Court's mandate is indeed misplaced—it should be directed to the court of appeals.

By its opinion on remand, the Commission has made it quite clear that in its judgment it has acted in accordance with the Court's opinion.

In their self-serving analysis of the Court's opinion, the respondents have chosen to treat the Court's "two suggestions" as something more—as "directions" to the Commission, and, as evidenced by their Proposed Alternative Form Of Order, they have chosen to ignore the Court's [fol. 100] observation that the order it set aside was *not* erroneous in every particular.

The Court directed the Commission to write a "new" order, one that did not prohibit the use of "mock-ups" en masse, this the Commission has done.

The Commission having already expressed itself on the matter of compliance with the Court's opinion, we see no need to reply further to respondents' arguments on this question.

The Commission's Proposed Final Order is not in conflict with the Court's opinion, in fact ~~the~~ order is perhaps narrower than it need have been. It is obvious from the Court's opinion that any demonstration that attributes to a product qualities that it does not possess should not be permitted. The Commission has not gone this far. Paragraph One of its order prohibits false demonstrations *only* when they involve the use of "a mock-up or substitute material or article".

Respondents' Proposed Alternative Form of Order is so limited in scope and application that one has difficulty seeing how it can be said that the issuance of such an order would serve to protect the public interest. It will be noted that if respondents used the same "sandpaper" demonstration to allegedly prove the "moisturizing qualities" of shaving cream that is sold in a tube their proposed order would not be violated.

Respondents' Proposed Form of Order and their argument in support thereof amounts to a contention that they are entitled to falsely advertise not only each product that they sell or advertise, but also each individual characteristic or quality of each product. Were the Commission so restricted in the scope of its orders, the Federal Trade Commission Act would be a virtual nullity:

As complaint counsel we are cognizant of the fact that it is not within our province to propose an "Alternative Form of Order" to the Commission, and we do not pro-[fol. 101] pose to do so. We suggest however, that the Commission give consideration to changing the preamble to its Proposed Final Order. It will be noted that, as written, said order does not relate to the sale of any product in "commerce", it declares that a false advertisement in "commerce" is an unfair method of competition or an unfair or deceptive act or practice. It is not our purpose here to question or to support the sufficiency of such an order, but we do question the advisability of entering such an order herein at this stage of the instant proceedings. We feel that this would be injecting something entirely new into the proceedings at a most inappropriate time and for this reason the Commission might wish to reconsider this point. Respondents' Proposed Alternative



Form of Order covers this point in the manner we would propose.

Respectfully submitted,

EDWARD F. DOWNS,  
ANTHONY J. KENNEDY, JR.,  
Complaint Counsel.

[fol. 102]

BEFORE

FEDERAL TRADE COMMISSION

Commissioners:

PAUL RAND DIXON,  
Chairman

SIGURD ANDERSON

PHILIP ELMAN

EVERETTE MACINTYRE

A. LEON HIGGINBOTHAM, JR.

Docket No. 7736.

IN THE MATTER OF

COLGATE-PALMOLIVE COMPANY, a corporation, and  
TED BATES & COMPANY, INC., a corporation.

THIRD AND FINAL ORDER AND MEMORANDUM  
of COMMISSION.—May 7, 1963

I.

IT IS ORDERED that respondent Colgate-Palmolive Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of any product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Unfairly or deceptively advertising any such product by presenting a test, experiment or demonstration that (1) is represented to the public as actual proof of a claim made for the product which [fol. 103] is material to inducing its sale, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop

instead of the product, article, or substance represented to be used therein.

## II.

IT IS FURTHER ORDERED that respondent Colgate-Palmolive Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of "Palmolive Rapid Shave" or any other shaving cream, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Falsely representing, in any respect material to inducing the sale of any such product, its moisturizing properties or other qualities or merits as an aid to shaving.

## III.

IT IS FURTHER ORDERED that respondent Ted Bates & Company, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of any product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Unfairly or deceptively advertising any such product by presenting a test, experiment or demonstration [fol. 104] that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sale, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop instead of the product, article, or substance represented to be used therein: provided, however, that it shall be a defense hereunder that respondent neither knew nor had reason to know that the product, article or substance used in the test, experiment or demonstration was a mock-up or prop.

## IV.

IT IS FURTHER ORDERED that respondent Ted Bates & Company, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of "Palmolive Rapid Shave" or any other shaving cream, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Falsely representing, in any respect material to inducing the sale of any such product, its moisturizing properties or other qualities or merits as an aid to shaving: provided, however, that it shall be a defense hereunder that respondent neither knew nor had reason to know of the falsity of such representation.

## V.

IT IS FURTHER ORDERED that each respondent shall, within sixty (60) days after service upon it of this order, file [fol. 105] with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission, Commissioner Anderson concurring in the result.

SEAL

s/ JOSEPH W. SHEA

JOSEPH W. SHEA,  
Secretary.

Issued: May 7, 1963

[fol. 106]

BEFORE

## FEDERAL TRADE COMMISSION

## Commissioners:

PAUL RAND DIXON,  
Chairman

SIGURD ANDERSON

PHILIP ELMAN

EVERETTE MACINTYRE

A. LEON HIGGINBOTHAM, JR.

Docket No. 7736.

## IN THE MATTER OF

COLGATE-PALMOLIVE COMPANY, a corporation, and  
TED BATES & COMPANY, INC., a corporation.

MEMORANDUM ACCOMPANYING FINAL ORDER—  
May 7, 1963

## By the Commission:

On February 18, 1963, the Commission issued its opinion on remand and a proposed new cease and desist order. On April 15, 1963, each of the respondents filed exceptions to the proposed order, and an alternative form of order. Respondents would limit the order so that it would apply only to the advertising of Rapid Shave or other aerosol shaving creams; it would prohibit only misrepresentation of the "moisturizing qualities" of such shaving creams, and only where the misrepresentation is made in a "visual [fol. 107] presentation of any experiment or test with the product, \* \* \* when the product does not have the moisturizing qualities so represented." Respondent Bates proposes further that its order should apply only when it "knew or reasonably should have known that the product did not have the moisturizing qualities so represented."

The function of a cease and desist order is to give solid assurance to the public and honest competitors that the



illegal and unfair practices found will not be resumed. Respondents' proposed order would do far too little in achieving that purpose. It would, at most, prevent respondents from repeating the precise misrepresentation of fact contained in the commercials which prompted the Commission to initiate this proceeding in January 1960. But the primary concern of Section 5 of the Federal Trade Commission Act, and cease and desist orders issued thereunder, is with "*unfair methods of competition*" and "*unfair or deceptive . . . practices in commerce.*"

When, as in this case, the record shows not merely a misrepresentation of fact concerning a product offered for sale, but the pursuance of an unfair and illegal form of advertising, manifested by its repetition over a substantial period of time, an effective order must also be directed at the form of advertising (i.e., the "practice" or "method of competition") found illegal. Respondents did more than misrepresent the moisturizing properties of Rapid Shave; they adopted, and pursued, a method of advertising which, because of the material falsehoods contained in such advertising, made it unfair to honest competitors and the public.

Respondents' proposed alternative form of order must, therefore, be rejected as ineffective and unrealistic. In the light of respondents' exceptions to the proposed final order, [fol. 108] the Commission has modified it in minor respects to make it more clear and specific; and as thus modified, the final order will be issued.

A word must be said about respondents' vigorous assertion that the Commission, since it did not file a petition for certiorari in the Supreme Court to review the decision of the Court of Appeals, is therefore barred from entering a new order at this time. In vacating our original order and remanding the case to the Commission for further proceedings because "we think it best that an entirely new one be prepared", 310 F. 2d at 94, the Court of Appeals expressed doubt and uncertainty as to the reach

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\* Presenting tests, demonstrations or experiments which are represented to the public to be actual proof of a material claim made for the product but which in fact are spurious and rigged, actually proving nothing.

and scope of the original order. It seemed to the Commission that, to a very considerable extent, these ambiguities were engendered by the extreme arguments made by counsel on both sides, in attacking as well as defending the order on appeal. In the circumstances, the most sensible, as well as the least dilatory, course for the Commission to follow was to proceed at once to remove those ambiguities, and to restate with clarity and precision the basis and breadth of our findings and order. This task, as the Supreme Court has frequently reminded the federal administrative agencies, is to be performed by the agency and not by its lawyers arguing on appeal. See, e.g., *SEC v. Chenery Corp.*, 318 U. S. 80, 94 (1943). For only the agency can, and should, exercise the administrative judgment and discretion involved in the formulation of an order.

Respondents urge nonetheless that the Commission, as a condition precedent to the formulation of a new order, was obliged to invoke the appellate jurisdiction of the Supreme Court by the filing of a petition for certiorari. But one need not be an expert in such matters to know that, in the posture of the case after the Court of Appeals decision, the filing of a petition for certiorari would not only have been inappropriate but an unwarranted imposition on the Supreme Court, which has repeatedly admonished against the filing of improvident petitions for certiorari. In light of the ambiguities found in our original decision and order by the Court of Appeals, the case was in no posture for Supreme Court review. Had such a petition been filed, the Supreme Court undoubtedly would have considered that the Commission, not the Court, should undertake to remove those ambiguities—a task we have now performed without wasting the Court's and the public's time. Possibly the Commission has erred in its handling of this case, but it most assuredly has not failed in its duty of respect to the Supreme Court and the Court of Appeals.

Commissioner Anderson concurs in the result.

May 7, 1963.

[fol. 110]

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

\_\_\_\_\_  
No. \_\_\_\_\_  
\_\_\_\_\_

COLGATE-PALMOLIVE COMPANY, PETITIONER

*against*

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION TO CORRECT, REVIEW AND SET ASIDE ORDER OF  
THE FEDERAL TRADE COMMISSION.—filed June 6, 1963

TO THE HONORABLE JUDGES OF THE UNITED STATES  
COURT OF APPEALS FOR THE FIRST CIRCUIT:

Petitioner, Colgate-Palmolive Company, a corporation (hereinafter referred to as "Colgate" or "petitioner"), pursuant to the Federal Trade Commission Act (§§ 5(c) and (i), 38 Stat. 719 (1914), as amended, 15 U. S. C. §§ 45(c) and (i) (1958)), the Administrative Procedure Act (§ 10(b), 60 Stat. 243, 5 U. S. C. § 1009 (b) (1952)) and Rule 16 of this Court, respectfully requests this Court to correct, review and set aside an order to cease and desist issued by the Federal Trade Commission in *In the Matter of Colgate-Palmolive Company, a corporation, and Ted Bates & Company, Inc., a corporation*, FTC Docket No. 7736, and as grounds therefor respectfully shows as follows:

[fol. 111]

I.

Basis of Venue.

1. This matter is before this Court for the second time. The instant petition is filed in this Court within 30 days after a "final order" dated May 7, 1963 was issued by the

Commission and received by petitioner by registered mail on May 17, 1963. Colgate is incorporated under the laws of the State of Delaware and carries on its business at offices and locations in this Circuit. It maintains a permanent sales office headed by a district sales manager in Boston, Massachusetts; has groups of employees permanently assigned to duties (which include the solicitation of customers) within the States of Massachusetts and Rhode Island; warehouses its products in said States; and has qualified to do business in said States. The advertising held by the Commission to be a violation of § 5(a) of the Federal Trade Commission Act was broadcast by television from stations in Boston, Massachusetts, and in other cities in this Circuit. The venue of this proceeding lies in this Court pursuant to § 5(c) of the Act, 38 Stat. 719 (1914), as amended, 15 U. S. C. § 45(c) (1958).

## II.

### Nature of Proceedings.

2. The latest order of the Commission, like the one set aside by this Court, is based on a conclusion that Colgate and its advertising agency, Ted Bates & Company, Inc., had violated § 5(a)(1) of the Federal Trade Commission Act (38 Stat. 719 (1914), 15 U.S.C. § 45(a)(1) (1958)) by preparing and causing to be telecast in the fall of 1959 three commercials which the Commission deemed to be deceptive and misleading. Colgate and its subsidiaries are engaged in the worldwide manufacture and distribution of house hold detergents, toilet articles, [fol. 112] industrial products, ethical drugs, and other goods: the commercials here in issue advertised one of the products in Colgate's toilet-article line, the pressurized shaving lather which it markets as "Palmolive Rapid Shave." Throughout the proceedings herein the Commission condemned the techniques used in the three filmed television commercials to illustrate Palmolive Rapid Shave's capacity—which the Commission has at no time questioned—to wet or soak a human beard and, as a result, to provide desirable shaves. Each of the commercials portrayed the application of Palmolive Rapid Shave

to sandpaper. As the announcer stated "apply . . . soak . . . off with a stroke," the commercials depicted a hand holding a razor and shaving the sandpaper. The commercials also depicted the application of Palmolive Rapid Shave to a man's face, a man shaving his lather-coated beard and, again, a hand shaving sandpaper. The commercials used, in place of sandpaper, a "mock-up" consisting of a piece of transparent material coated with sand.

3. The first order of the Commission in this case (Exhibit A hereto) was set aside by this Court by decree and opinion dated November 20, 1962 (*Colgate-Palmolive Company v. Federal Trade Commission*, Nos. 5972 and 5986, 310 F. 2d 89 (1st Cir. 1962)) (Exhibit B hereto). The decree of this Court ordered, adjudged and decreed that further proceedings were to be in accordance with its opinion filed that day. The opinion of this Court held, *inter alia*, that the Commission committed "fundamental error" in finding the use of a mock-up to be illegal and that the only proper order was one appropriate to the making of a single misrepresentation about a single product, i.e., the facility with which Palmolive Rapid Shave could shave sandpaper.

4. Thereafter, the Commission issued a second opinion and a proposed order under date of February 18, 1963 (two of the five Commissioners concurring in the result) (Exhibit C hereto). The second opinion asserted, *inter* [fol. 113] *alia*, that the use of a mock-up in this case was itself an independent violation of law and an illegal practice. The opinion also claimed that the second paragraph of the order to which this Court had earlier addressed itself had been reviewed and sustained by this Court without modification. The proposed final order embraced substantially the same activities and products of petitioner which the Commission sought to bar in its first order already set aside by this Court. In its second order, the Commission allowed petitioner 20 days after service of its proposed order to file with the Commission any exceptions (and supporting statement) to the proposed order and a proposed alternative form of order.



5. Petitioner's exceptions, statement, and proposed alternative form of order were filed with the Commission on April 15, 1963 (Exhibit D hereto). Complaint counsel filed a statement in reply to petitioner's exceptions received by petitioner by mail on April 29, 1963 (Exhibit E hereto). The third order of the Commission, accompanied by a memorandum, each dated May 7, 1963, (received by petitioner May 17, 1963) (Exhibit F hereto), seeks to embrace substantially the same activities and products as its earlier two orders; the memorandum concludes that the Commission "most assuredly has not failed in its duty of respect to the Supreme Court and the Court of Appeals." One Commissioner concurred in the result.

6. The Commission's third order was issued despite petitioner's demonstration in its exceptions filed with the Commission that this Court had ruled as a matter of law (1) that the use of a mock-up in this case was not illegal and that (2) petitioner's "only offense was the making of a single misrepresentation about a single product" and the Commission was "well aware of the scope to be applied to single misrepresentations." The Commission's third order seeks to bar Colgate from:

"Unfairly or deceptively advertising any [of the products sold by it] by presenting a test, experiment [fol. 114] or demonstration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sale, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop instead of the product, article, or substance represented to be used therein."

and, with respect to any shaving cream, from:

"Falsely representing, in any respect material to inducing the sale of any such product, its moisturizing properties or other qualities or merits as an aid to shaving."



7. On June 6, 1963, petitioner filed with the Commission a motion to correct its third order, stating that the motion was filed with the Commission as a procedural safeguard to preserve its rights to secure judicial review of the order of the Commission. On June 6, 1963, petitioner filed in this Court a motion for leave to file a petition for a writ of mandamus or prohibition or for an order in the nature of mandamus or prohibition; the motion papers state that the motion is filed as a precautionary measure in the event that it were ever determined that the instant petition is inadequate to invoke the jurisdiction of this Court.

### III.

#### Grounds for Relief.

8. The grounds on which relief is sought are:

A. Each of the two paragraphs of the new order fails to accord with the decree of this Court and should be corrected.

(1) The first ordering paragraph improperly defies the holding of this Court that the use of a mock-up in this case did not violate governing law. [fol. 115] (2) Both ordering paragraphs improperly defy the holding of this Court that Colgate was guilty only of a single representation about a single product and that this fact delimited the proper scope of the order both as to product coverage and advertising content.

B. On remand the Commission sought to reargue views already presented to and rejected by this Court after thorough consideration and deliberation. No new arguments were made in the remand proceedings; and the Commission, in any event, did not petition for rehearing in this Court, or petition the Supreme Court for a writ of certiorari. Even if—contrary to governing law—*de novo* consideration were given to the arguments of the Commission, its views are without support in statute or precedent and were properly rejected by this Court on grounds stated in this Court's opinion and in petitioner's earlier Peti-

tion for Review and to Set Aside dated March 2, 1962. The grounds stated in said earlier Petition at pp. 6-10 (except for those Grounds for Relief set forth therein which solely pertain to the making of a single misrepresentation about a single product) are hereby incorporated by reference as if fully set forth herein.

#### IV.

#### Relief Prayed For.

WHEREFORE, petitioner respectfully prays that this Court review the aforesaid proceedings and the order to cease and desist entered thereon, set aside the order of the Commission, correct said order so that it will accord with the decree of this Court that it be confined to a scope [fol. 116] appropriate to a single misrepresentation about a single product, and award such further or alternative relief as may seem just and proper to the Court.

Dated: June 6, 1963.

Respectfully submitted,

s/ JOHN F. GRODEN

John F. Groden

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Attorneys for Colgate-Palmolive  
Company,

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Of Counsel:

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MATHIAS F. CORREA,

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80 Pine Street,

New York 5, New York.

[fol. 117]

IN THE

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT.

Docket No. 7736.

TED BATES &amp; COMPANY, INC., Petitioner,

*against*

FEDERAL TRADE COMMISSION, Respondent.

PETITION FOR REVIEW AND TO CORRECT AN ORDER OF THE  
FEDERAL TRADE COMMISSION RENDERED NOT IN AC-  
CORDANCE WITH THE MANDATE OF THE COURT OF  
APPEALS.—Filed June 6, 1963.

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT  
OF APPEALS FOR THE FIRST CIRCUIT:

Petitioner Ted Bates & Company, Inc., respectfully petitions this Court, pursuant to the provisions of the Federal Trade Commission Act, Section 5(c), 38 Stat. 791 (1914), as amended, 15 U. S. C. § 45(c) (1958), and Section 5(i), 52 Stat. 114 (1938), as amended, 15 U. S. C. § 45(i) (1958), and Section 10(b) of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009(b) (1958), to review and to correct an order to cease and desist rendered by the Federal Trade Commission on May 7, 1963. The Commission's order was entered in *In the Matter of Colgate-Palmolive Company, a corporation, and Ted Bates & Company, Inc., a corporation*, FTC Docket No. 7736, a proceeding on remand from a decision and decree of this Court setting aside the Commission's prior order in the same proceeding. *Colgate-Palmolive Company and Ted Bates & Company, Inc. v. Federal Trade Commission*, Nos. 5972 and 5986, 310 F. 2d 89 (1962). As required by Section 5(i) of the Federal Trade Commission Act, [fol. 118] this petition is filed within 30 days after the entry of the order of the Commission refusing to follow the decision and mandate of this Court.

As grounds for this petition, Ted Bates & Company, Inc., represents as follows:

## I.

### Basis of Venue.

1. The advertising that was held by the Commission to constitute a violation of Section 5 of the Federal Trade Commission Act was broadcast by television from stations in Boston, Massachusetts, and in other cities in this Circuit. Accordingly, the venue of this proceeding lies in this Court pursuant to Section 5(c) of the Federal Trade Commission Act, 38 Stat. 719 (1914), as amended, 15 U. S. C. § 45(c) (1958), and Section 5(i) of the Act, 52 Stat. 114 (1938), as amended, 15 U. S. C. § 45(i) (1958).

## II.

### Nature of Proceedings.

2. Petitioner Ted Bates & Company, Inc. (hereinafter "Bates") is a corporation organized and existing under the laws of the State of New York with executive offices at 666 Fifth Avenue, New York 19, New York, from which it carries on the general business of an advertising agency.

3. This case is before the Court a second time because of the demonstrable refusal of the Commission to follow the decision and mandate of this Court. The nature of the prior proceedings before the Commission and in this Court which bear upon the corrective judicial action now sought by Bates may be briefly stated:

a. On December 29, 1961, the Federal Trade Commission ruled that Bates and Colgate-Palmolive Company [fol. 119] (hereinafter "Colgate") had violated Section 5 of the Federal Trade Commission Act in advertising for sale, by means of certain television commercials prepared and placed for publication by Bates on Colgate's behalf, Colgate's aerosol shaving cream, "Palmolive Rapid Shave." The Commission held that the challenged commercials constituted false and misleading advertising in violation of Section 5 for two reasons. The Commission

first ruled that the commercials had falsely represented that "Palmolive Rapid Shave" had such moisturizing qualities that "it is possible immediately after application of 'Palmolive Rapid Shave' to shave very coarse, dry sandpaper" with a single stroke of the razor.

Second, and as an independent ground for finding a violation of the Act, the Commission ruled that even if the claim as to the moisturizing qualities of the product had been true, the television commercials violated Section 5 because a mock-up of plastic coated with sand had been used instead of actual sandpaper in portraying a test or experiment showing the shaving of sandpaper on television.

b. The Commission entered an order directing Bates, as well as Colgate, to cease and desist in the advertising, offering for sale, sale or distribution of shaving cream "or any other product" from:

"Representing, directly or by implication in describing, explaining, or purporting to prove the quality or merits of any product, that pictures, depictions, or demonstrations, either alone or accompanied by oral or written statements, are genuine or accurate representations, depictions, or demonstrations of, or prove the quality or merits of, any product, when such pictures, depictions, or demonstrations are not in fact genuine or accurate representations, depictions, or demonstrations of, or do not prove the quality or merits of, any such product."

Bates and Colgate each were further ordered in the advertising, offering for sale, sale or distribution of "Palmolive Rapid Shave" or "any other shaving cream," to cease and desist from:

[fol. 120] "Misrepresenting, in any manner, directly or by implication, the quality or merits of any such product."

(A copy of the Commission's prior order and accompanying opinion is attached hereto as Exhibit A.)

c. Upon petitions for review and to set aside the Commission's order filed by Bates and Colgate (Nos. 5972 and

5986), this Court, after full argument and briefing, reviewed the Commission's opinion and order. In November 20, 1962, the Court rendered a unanimous decision that fully disposed of all the issues raised by Bates and Colgate and presented by the Commission's opinion and order. 310 F. 2d 89. (A copy of this Court's Opinion is attached as Exhibit B.)

The Court first upheld the Commission's ruling that "Palmolive Rapid Shave," the single product involved in these proceedings, did not have the moisturizing quality that had been claimed for it in the challenged television advertising, that this particular claim made for the product was "material," and that the advertising therefore violated Section 5 of the Federal Trade Commission Act. 310 F. 2d at pp. 91-92.

The Court also dealt expressly with the second further independent ground upon which the Commission had found a violation of Section 5—that relating to the use of mock-ups in making truthful advertising claims, which was proscribed in the first portion of the Commission's order quoted above. On this issue the Court reversed the Commission.

The Court held that television advertising which makes a truthful claim for a product does not violate Section 5 merely because a mock-up or prop is used in the advertising instead of the product or instead of some substance represented in the advertising as being used with the product. *Id.* at pp. 93-94.

Apart from disposing of the two substantive grounds for the Commission's decision under Section 5 of the Act, the Court also set forth significant limitations upon any [fol. 121] order that the Commission might enter on remand. Noting that its decision had upheld only the Commission's determination as to a "single misrepresentation about a single product," the Court directed the Commission's attention to the proper scope of an order to be applied to single misrepresentations. *Id.* at 94. Further, as to Bates, the Court stated that it doubted that an order to be entered against an advertising agency should proscribe its conduct in the absence of knowledge on the agency's part as to the falsity of the advertisements. *Id.* at p. 94.



The judgment of the Court was entered in a decree issued the same day the Court rendered its decision. The decree set aside the order of the Commission in its entirety and remanded the case for further proceedings in accordance with the Court's opinion.

4. The Commission did not petition this Court for rehearing. The Commission did not petition the Supreme Court for a writ of certiorari. Nor did the Commission, on remand, authorize Bates and Colgate to file briefs or other papers dealing with the form and scope of the order to be entered in accordance with the decision and mandate of this Court.

Instead, on February 18, 1963, almost three months after this Court's decision, the Commission issued a new "proposed final order" that squarely undertook to prescribe the use of mock-ups in television or any other visual advertising. In this fundamental respect, the proposed order was in direct conflict with and in defiance of the decision and mandate of this Court. The new proposed final order also conflicted with the rulings of the Court in further respects; in particular, the proposed order applied to "any products" for which Bates might in the future prepare advertising or that Colgate might advertise.

The Commission's refusal to follow the decision and mandate of this Court was set forth in an opinion accompanying the "proposed final order." (A copy of the "proposed final order" and the opinion is attached as Exhibit C.)

[fol. 122] 5. Pursuant to the Commission's direction, Bates and Colgate each filed specific, detailed exceptions to the Commission's proposed final order and submitted an alternative form of order which they believed to be in accordance with the mandate and decision of this Court. (A copy of Bates' Exceptions and Proposed Alternative Form of Order is attached as Exhibit D, and a copy of the Statement of Complaint Counsel in Reply is attached as Exhibit E.)

On May 7, 1963, the Commission entered a new "final order." (The Commission did not serve the further "final order" upon Bates and Colgate until May 17, 1963, ten days later.) That order, although differing in certain

respects from the Commission's proposal of February 18, 1963, again reflected the Commission's studied refusal to comply with the decision and mandate of this Court. (This order, accompanied by a further Commission Memorandum Opinion, is attached as Exhibit F.)

Paragraphs III and IV of the final order are applicable to Bates alone. Paragraph III, like the comparable portion of the first "proposed final order," again proscribes the use of mock-ups in advertising even a truthful product claim. It continues to have application to all products for which Bates may hereafter prepare and disseminate advertising for all advertisers whom it now serves or may serve in the future.

Paragraph III thus directs Bates to cease and desist, in the offering for sale, sale or distribution "of any product," from:

"Unfairly or deceptively advertising any such product by presenting a test, experiment or demonstration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sale, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop instead of the product, article, or substance represented to be used therein: provided, however, that it shall be a defense hereunder that respondent neither knew nor had [fol. 123] reason to know that the product, article or substance used in the test, experiment or demonstration was a mock-up or prop."

In paragraph IV Bates is further directed to cease and desist, in the offering for sale, sale or distribution of "Palmolive Rapid Shave" or any other shaving cream," from:

"Falsely representing, in any respect material to inducing the sale of any such product, its moisturizing properties or other qualities or merits as an aid to shaving: provided, however, that it shall be a defense hereunder that respondent neither knew nor

had reason to know of the falsity of such representation."

An order in the same terms but without provisions making lack of knowledge a defense was entered against Colgate (Paras. I and II).

### III.

#### Grounds for Relief.

6. The grounds on which relief is sought are that the order of the Commission does not accord with the decision and mandate of this Court, as required by Section 5(i) of the Federal Trade Commission Act, in the following respects:

a. Paragraph III of the order improperly and unlawfully prohibits Bates from preparing and disseminating advertising of a product that portrays a test, experiment or demonstration making a truthful product claim if the advertising uses a mock-up instead of the product or instead of any substance used with the product in such test, experiment or demonstration. This portion of the order should be stricken in its entirety; it is clearly at odds with the decision and mandate of the Court in this case.

b. Paragraph III also improperly and unlawfully prohibits Bates from using mock-ups in such advertising of [fol. 124] "any product" of any advertiser whom Bates now serves or may hereafter be called upon to serve as an advertising agency. This sweeping and unlimited product coverage of the order would of course be disposed of if the entire Paragraph III is stricken, as is urged by Bates in the first instance. In any event, in keeping with the statement of the Court that this proceeding involves only a "single misrepresentation about a single product," the product coverage of Paragraph III should be confined to "Palmolive Rapid Shave" or any other aerosol shaving cream having substantially the same composition made, sold and advertised by Colgate-Palmolive Company."

c. Paragraph IV of the order should likewise be limited, as regards product coverage, to encompass only "Palmolive Rapid Shave" or any other aerosol shaving cream

having substantially the same composition made, sold and advertised by Colgate-Palmolive Company."

d. Paragraph IV of the order is further improperly broad in that it proscribes representations as to the "moisturizing properties or other qualities or merits" of the products covered by that paragraph. The order should be confined to product claims regarding the "moisturizing properties" of the products covered. ●

e. Both Paragraphs III and IV improperly require Bates to establish by proof in any future proceedings under the order that it lacked knowledge as to whether mock-ups have been used or as to the falsity of any advertising representations proscribed by the order. These portions of the order should be redrawn to require the Commission itself to prove in any future proceedings that Bates had the requisite knowledge regarding the use of mock-ups and as to the falsity of any representations made.

f. Nothing in the Commission's opinion accompanying its "proposed final order" of February 18, 1963 (Exhibit C), which proposed order was patently contrary to the decision and mandate of this Court, supports its final order of May 7, 1963. The Commission's opinion of February [fol. 125] 18, 1963, sought to reargue the views rejected by this Court as to the use of a mock-up to present a truthful product claim. That basic issue had been fully considered and decided by this Court. The Commission did not petition for rehearing in this Court, or petition for a writ of certiorari in the Supreme Court. Moreover, as made abundantly clear on the earlier review, the Commission's argument—that a mock-up may not be employed in the presentation of a truthful product claim—is without support in the Federal Trade Commission Act, and was properly rejected by this Court. (See Exhibit B, pp. 8-11.)

## IV.

## Relief Prayed.

The Commission has twice failed—indeed as demonstrated by its opinions on remand, it has patently refused—to enter an order in accordance with the mandate of the Court. Because of the Commission's plain refusal to comply with the mandate, this proceeding has been brought before the Court a second time. It does not appear that the interests of any of the parties, including the Commission, or the efficient administration of the laws would be served by a further remand of this proceeding to the Commission. Further, because the sole question presented for review by the Court is whether the order of the Commission accords with the Court's decision and mandate, the record on review need be no more extensive than the attachments to this petition, Exhibits A-F.

WHEREFORE, petitioner Ted Bates & Company, Inc., respectfully prays that this Court review the order rendered by the Commission on May 7, 1963, to determine whether that order is in accord with the decision and mandate of this Court dated November 20, 1962; that the Court set aside the order of the Commission as not in accord with the Court's decision and mandate; and that the [fol. 126] Court enter an order which does accord with its decision and mandate in the following form:

“It is Ordered that respondent Ted Bates & Company, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporation or other device, in the advertising of ‘Palmolive Rapid Shave’ or any other aerosol shaving cream having substantially the same composition made, sold and advertised by respondent Colgate-Palmolive Company, in commerce, as ‘commerce’ is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

“Misrepresenting, in any respect material to inducing the sale of any such product, the moisturizing qualities of that product through visual presentation of any experiment or test with the product, either

alone or accompanied by oral or written statements, when respondent knew or reasonably should have known that the product did not have the moisturizing qualities so represented."

Respectfully submitted,

Dated: June 6, 1963.

LANE MCGOVERN

ROPES AND GRAY

Attorneys for Petitioner

Ted Bates & Company, Inc.

50 Federal Street

Boston 10, Mass.

Of Counsel:

JOSEPH A. MCMANUS

COUDERT BROTHERS

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New York 17, N. Y.

H. THOMAS AUSTERN

ALVIN FRIEDMAN

COVINGTON & BURLING

701 Union Trust Building

Washington 5, D. C.



[fol. 127]

BEFORE

## FEDERAL TRADE COMMISSION

Docket No. 7736.

## IN THE MATTER OF

COLGATE-PALMOLIVE COMPANY, a corporation, and  
TED BATES & COMPANY, INC., a corporation

MOTION OF RESPONDENT COLGATE-PALMOLIVE COMPANY  
TO CORRECT THE ORDER OF THE COMMISSION TO AC-  
CORD WITH THE DECISION AND MANDATE OF THE COURT  
OF APPEALS.—Filed June 6, 1963.

Respondent Colgate-Palmolive Company moves that the Commission correct its Order rendered herein on May 7, 1963, to accord with the decision and mandate of the United States Court of Appeals for the First Circuit in *Colgate-Palmolive Company and Ted Bates & Company, Inc. v. Federal Trade Commission*, Nos. 5972 and 5986, decided November 20, 1962 (310 F. 2d 89), in which decision the Court set aside the prior order of the Commission entered herein and remanded the case for proceedings in accordance with the Court's opinion.

As grounds for this motion, respondent respectfully represents as follows:

1. This motion is filed within 30 days from the date the Commission's Order of May 7, 1963 was rendered, which Order was not served upon respondent [fol. 128] until May 17, 1963. The motion is intended solely as a procedural safeguard to preserve all rights of respondent to secure judicial review of the Commission's Order.

2. The May 7, 1963 Order of the Commission is not in accord with the decision and mandate of the Court in the respects set forth in respondent's "Exceptions to Proposed Order, Statement and Proposed Alternative Form of Order of Respondent Colgate-Palmolive Company" (filed with the Commission on

April 15, 1963) to the extent said "Exceptions" have not been adopted in the Commission's Order of May 7, 1963. The respects in which the Commission's said Order is not in accord with the decision and mandate of the Court are also set forth in respondent's Petition to Correct, Review and Set Aside Order of the Federal Trade Commission filed this day with the Court of Appeals for the First Circuit.

The interests of the Commission and of respondent will be served by an expeditious review by the Court of the Commission's Order of May 7, 1963. To facilitate such review, it is respectfully requested that the Commission take prompt action with respect to this motion.

WHEREFORE, respondent Colgate-Palmolive Company respectfully prays that the Commission correct its Order of May 7, 1963, to accord with the decision and mandate of the Court of Appeals and, to this end, enter the alternative form of order proposed by respondent in its above- [fol. 129] referred to "Exceptions" filed with the Commission on April 15, 1963.

Dated: June 6, 1963

Respectfully submitted,

s/ MATHIAS F. CORREA

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MATHIAS F. CORREA  
Attorney for Respondent  
Colgate-Palmolive Company

Of Counsel:

CAHILL, GORDON, REINDEL & OHL  
Arthur Mermin  
80 Pine Street  
New York 5, New York

[fol. 130]

BEFORE

## FEDERAL TRADE COMMISSION

Docket No. 7736.

## IN THE MATTER OF

COLGATE-PALMOLIVE COMPANY, a corporation, and  
TED BATES & COMPANY, INC., a corporation.

MOTION OF RESPONDENT TED BATES & COMPANY, INC.  
TO CORRECT THE ORDER OF THE COMMISSION TO AC-  
CORD WITH THE DECISION AND MANDATE OF THE COURT  
OF APPEALS.—Filed June 6, 1963.

Respondent Ted Bates & Company, Inc., moves that the Commission correct its Order rendered herein on May 7, 1963, to accord with the decision and mandate of the United States Court of Appeals for the First Circuit in *Colgate-Palmolive Company and Ted Bates & Company, Inc. v. Federal Trade Commission*, Nos. 5972 and 5986, decided November 20, 1962 (310 F. 2d 89), in which decision the Court set aside the prior order of the Commission entered herein and remanded the case for proceedings in accordance with the Court's opinion.

As grounds for this motion, respondent respectfully represents as follows:

1. This motion is filed within 30 days from the date the Commission's Order of May 7, 1963, was rendered, which Order was not served upon respondent [fol. 131] until May 17, 1963. The motion is intended solely as a procedural safeguard to preserve all rights of respondent to secure judicial review of the Commission's Order.

2. The May 7, 1963, Order of the Commission is not in accord with the decision and mandate of the Court in the respects set forth in respondent's "Exceptions to Proposed Final Order, Statement of Reasons in Support of Exceptions and Proposed Alternative Form of Order in Accordance with the Mandate of the Court of Appeals" filed with the

Commission on April 15, 1963, to the extent said "Exceptions" have not been adopted in the Commission's said Order of May 7, 1963. The respects in which the Commission's said Order is not in accord with the decision and mandate of the Court are also set forth in a Petition for Review and to Correct an Order of the Federal Trade Commission filed this day with the Court of Appeals for the First Circuit.

The interests of the Commission and of respondent will be served by an expeditious review by the Court of the Commission's Order of May 7, 1963. To facilitate such review, it is respectfully requested that the Commission take prompt action with respect to this motion.

WHEREFORE, respondent Ted Bates & Company, Inc., respectfully prays that the Commission correct its Order of May 7, 1963, to accord with the decision and mandate of the Court of Appeals and, to this end, enter the alternative form of order proposed by respondent in its above-[fol. 132] referred to "Exceptions" filed with the Commission on April 15, 1963.

Respectfully submitted,

JOSEPH A. MCMANUS,

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JOSEPH A. MCMANUS,

200 Park Avenue,  
New York 17, New York.

Dated: June 6, 1963.

H. THOMAS AUSTERN,

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H. THOMAS AUSTERN,  
ALVIN FRIEDMAN,

---

ALVIN FRIEDMAN,

701 Union Trust Building,  
Washington 5, D. C.

Attorneys for Respondent Ted Bates  
& Company, Inc.

Of Counsel:

Coudert Brothers,  
Covington & Burling.

[fol. 133]

BEFORE

## FEDERAL TRADE COMMISSION

Commissioners:

PAUL RAND DIXON, Chairman  
 SIGURD ANDERSON  
 PHILIP ELMAN  
 EVERETTE MACINTYRE  
 A. LEON HIGGINBOTHAM, JR.

Docket No. 7736.

IN THE MATTER OF

COLGATE-PALMOLIVE COMPANY, a corporation, and  
 TED BATES & COMPANY, INC., a corporation.

ORDER DENYING MOTIONS TO CORRECT  
 FINAL ORDER.—June 11, 1963.

Upon consideration of the motions filed on June 6, 1963, by respondents to correct the final order rendered in this proceeding on May 7, 1963, and

It appearing that each motion recites that it "is intended solely as a procedural safeguard to preserve all rights of respondent to secure judicial review of the Commission's Order", and

It further appearing that the motions are based upon the mistaken premise that the Commission's final order is in conflict with the prior decision and mandate of the Court of Appeals for the First Circuit in this proceeding. [fol. 134] *Colgate-Palmolive Company and Ted Bates & Company, Inc. v. Federal Trade Commission*, 310 F. 2d 89 (November 20, 1962):

IT IS ORDERED that the motions be, and they hereby are, denied.

By the Commission.

SEAL

(Sgd.) JOSEPH W. SHEA  
 JOSEPH W. SHEA,

Issued: June 11, 1963

Secretary.

[fol. 135]

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

Nos. 6145 and 6147

COLGATE-PALMOLIVE COMPANY, Petitioner,

v.

FEDERAL TRADE COMMISSION, Respondent.

Nos. 6146 and 6148

TED BATES & COMPANY, INC., Petitioner

v.

FEDERAL TRADE COMMISSION, Respondent

MOTION TO INCORPORATE IN THE INSTANT MATTERS AS  
RESPONDENT'S RECORD APPENDIX THE PRINTED JOINT  
CONSOLIDATED RECORD HERETOFORE FILED IN NOS.  
5972 AND 5986—Filed October 16, 1963.

COMES NOW the Federal Trade Commission, respondent,  
and pursuant to the Court's Rules 16(7) and 16(8) moves  
the Court to incorporate in the instant matters as re-  
spondent's record appendix the printed joint consolidated  
record filed in Nos. 5972 and 5986. In support of its mo-  
tion respondent states as follows:

[fol. 136] 1. On November 20, 1962, this Court filed its  
opinion and decree in *Colgate-Palmolive Company v. Fed-  
eral Trade Commission*, 1st Cir., Nos. 5972 and 5986, set-  
ting aside the order of the Federal Trade Commission  
and directing that "further proceedings are to be in ac-  
cordance with the opinion filed this day."

2. On February 18, 1963, the Commission issued its  
opinion on remand and its "Order Providing for the Filing  
of Exceptions to Proposed Final Order," which order in-  
cluded the proposed final order. In its opinion the Com-



mission stated: "On this remand the Commission has undertaken to reconsider the entire case, and to formulate a new order in light of the various suggestions contained in the opinion of the Court."

3. On May 7, 1963, the Commission issued its final order, which is the subject of the instant review proceedings. The record before the Commission subsequent to the Court's remand consisted of the entire record in Commission Docket No. 7736, which includes not only the record made after remand but also the record made prior to the petitions for review in the Court's Nos. 5972 and 5986.

4. On July 16, 1963, the Commission certified the transcript in the instant appeals by transmitting a "complete transcript of proceedings had before the Federal Trade [fol. 137] Commission in the above entitled matter, after remand from the United States Court of Appeals for the First Circuit." The certificate also stated: "That the record in the Commission's proceeding prior to remand was certified to the United States Court of Appeals for the First Circuit on April 9, [1962]." The transcript certified by the Commission in the instant matters consists of the material certified on July 16, 1963, as well as that certified on April 9, 1962.

5. The material in the certified record that we believe is pertinent to the matters now before the Court, which has not been printed in Petitioners' Consolidated Record Appendix, was printed in the Joint Consolidated Record Appendix heretofore filed in Nos. 5972 and 5986.

WHEREFORE, respondent prays that the Court issue its order incorporating in the instant matters as respondent's record appendix, the Joint Consolidated Record Appendix heretofore filed in Nos. 5972 and 5986.

Respectfully submitted,

/s/ J. B. Truly

J. B. TRULY,

Assistant General Counsel,  
Federal Trade Commission,  
Attorney for Respondent.

Dated: October 11, 1963.

[fol. 138] \* \* \*

[fol. 139]

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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Nos. 6145 and 6147

COLGATE-PALMOLIVE COMPANY, Petitioner

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

---

Nos. 6146 and 6148

TED BATES & COMPANY, INC., Petitioner

vs.

FEDERAL TRADE COMMISSION, Respondent

**MEMORANDUM OF COLGATE-PALMOLIVE COMPANY IN OPPOSITION TO MOTION BY RESPONDENT, FEDERAL TRADE COMMISSION, TO ENLARGE THE RECORD.—Filed October 16, 1963.**

Now comes petitioner, Colgate-Palmolive Company, and submits this Memorandum in opposition to the motion by respondent Federal Trade Commission, to enlarge the record in the instant proceedings by adding to it the printed record on the prior appeals to this Court—Nos. 5972 and 6986. The motion of the Commission is made pursuant to Rule 16 (7) and (8) of the Rules of this Court. It appears that subsection (8)—which permits enlargement in cases of error or misstatement—must be the basis for the Commission's motion. On July 16, 1963 [fol. 140] the Commission filed with this Court a certified list of material constituting the record in the instant proceedings which did not include the earlier matters which the Commission's motion seeks to add.\* Moreover, on July

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\* This conclusion we believe to be justified from the face of the list so certified.

22, 1963 the Commission was a party to a joint motion to this Court which stated at page 2: "The record on appeal was filed with the Clerk of the Court on July 16, 1963". It is therefore evident that the Commission is now attempting to enlarge the record, and that the issue before the Court is that set forth in Rule 16 (8) mainly, whether anything "material" has been omitted from the existing record.

It is submitted that nothing "material" to the instant proceedings lies outside of the present record.

The earlier appeals are closed. They involved questions both of fact and law fully treated by the Court. Petitioner did not ask to re-argue or to appeal the Court's determinations. Similarly, the Commission did not seek to re-argue, to adduce additional evidence or to appeal. The determinations of this Court have therefore been final and binding on all parties.

The present proceedings are confined to a single question of law: whether the action of the Commission after remand conforms to the decree of this Court. The present record already contains everything which occurred beginning with the decree of the Court and therefore includes everything "material" to the instant proceedings. Perhaps no better proof of this fact exists than the brief submitted [fol. 141] by the Commission. That brief admits that the primary question now before the Court (broken down by the brief in two parts) is whether the Commission has taken action consistent with the direction of the Court (pp. 1-2), and then goes on to pose two additional questions (p. 2) both of which are also questions of law—and are, indeed, addressed to whether the Commission obeyed the Court's decree in two specific areas. None of the questions thus posed by the Commission requires for its resolution citation to the record before the Court in the earlier appeals. This is demonstrated by the brief itself which goes on to discuss the issues posed by it and nowhere finds it necessary to cite the prior record for facts "material" to any of the arguments made by it.\*

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\* The brief refers in a footnote at p. 25 to the earlier record in a glancing manner clearly immaterial to its argument.

Significantly, the Commission's motion does not contradict the example of its brief: the motion offers no reason why the Commission wishes to enlarge the record.

It therefore appears that the Commission would in no way be prejudiced by denial of a motion which comes after the Commission has submitted its brief to the Court. Surely a motion so belated should meet a standard of good cause for its granting—and this the Commission has not even attempted.

It is submitted that the motion should be denied on the ground that there has been no showing that anything [fol. 142] "material" to the instant proceedings before this Court lies outside the present record.

Respectfully submitted,

WITHINGTON, CROSS, PARK & MCCANN

By John F. Groden  
JOHN F. GRODEN,  
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Of Counsel:

CAHILL, GORDON, REINDEL & OHL,  
MATHIAS F. CORREA,  
80 Pine Street  
New York 5, New York

October 15, 1963

CERTIFICATE OF SERVICE

[Omitted in printing]

[fol. 143] . . .

[fol. 144]

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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Nos. 6145 and 6147

COLGATE-PALMOLIVE COMPANY, Petitioners

v.

FEDERAL TRADE COMMISSION, Respondent

Nos. 6146 and 6148

TED BATES &amp; COMPANY, INC., Petitioner

v.

FEDERAL TRADE COMMISSION, Respondent

MEMORANDUM OF TED BATES & COMPANY, INC., IN OPPOSITION TO MOTION BY RESPONDENT FEDERAL TRADE COMMISSION TO ENLARGE THE RECORD BY INCORPORATING THE RECORD IN THE INSTANT APPEALS—Filed October 16, 1963.

Petitioner Ted Bates & Company, Inc., submits this memorandum, pursuant to Rule 25 of the Court's Rules, in opposition to the motion of respondent Federal Trade Commission to enlarge the record in the instant appeals by incorporating the record that was before the Court in the prior appeals, Nos. 5972 and 5986.

[fol. 145] The Commission's motion should be denied. It is an untimely and unjustifiable attempted reversal of the Commission's prior position as to the scope of the record in the instant appeals. Moreover, the Commission has demonstrated no need for the enlargement of the record it belatedly seeks. The Commission's brief in the instant appeals discloses the enlargement of the record it now

requests is entirely unnecessary for proper presentation of its arguments to this Court.

1. The Commission's motion would have it appear that the Commission always envisaged the record in the prior appeals to be a part of the record in the instant appeals. This is contrary to fact.

It is clear beyond dispute that the Commission's position was that the record in the instant appeals did not include the record that was before the Court in the prior appeals. The Commission, it must be recalled, joined with petitioners in stating in the *Joint Motion to Consolidate Appeals, etc.*, filed on July 22, 1963, that: "The record on appeal was filed with the Clerk of the Court on July 16, 1963." The record filed on that date did not include the record in the prior appeals. The attached extract (Exhibit A) from the files of the Clerk of this Court makes clear that the "material certified" to the Court at that time embraced no portion of the record in the prior appeals.

The Commission should not be allowed to reverse its position at this late date—when it has already filed its [fol. 146] brief, and long after petitioners had briefed the instant appeals—and thus secure an enlargement of the record after months have elapsed since by its own action it agreed as to the record in the instant appeals.

2. Not only has the Commission offered no explanation of its delay in seeking the enlargement of the record, but it also has offered no reasons why its motion should be granted.

By contrast, persuasive grounds exist for rejecting the Commission's request. Despite its strenuous effort to enlarge the record, the Commission's brief in the instant appeals is remarkable for its failure to rely upon the record in the prior appeals. Indeed, only once in the course of its argument (in a passing footnote, Br., p. 25 n. 10) does the Commission even refer to that record. Even there, the reference made is only to assist in supporting the obvious proposition that a careful fact analysis is often required to determine whether advertising representations as to the qualities of a product can be substantiated in any particular case by "the actual capacity



of a product." That question is not presented on this appeal; and, in any event, it should certainly require no record citations to establish this essential proposition which is fundamental to any false advertising proceeding. Of course, what an advertisement claims a product can do must be true. But this has nothing to do with the question whether, where the claim for the product is true, the use of a prop or mock-up is unlawful. Nor does it remotely bear on the issue in the instant appeals—[fol. 147] whether the Commission has failed to comply with this Court's decision and mandate.

Were the Commission to demonstrate a reasonable need for enlarging the record in the instant appeals, the Court might then perhaps be called upon to weigh that need and, after doing so, determine whether the motion should be granted. Here, however, no need whatsoever has been offered by the Commission. In light of the Commission's inordinate delay in seeking the enlargement it requests, the proper course in such circumstances is to deny the motion.

Respectfully submitted,

/s/ Lane McGovern

/s/ Ropes & Gray,

LANE MCGOVERN

ROPES & GRAY,

Attorneys for Petitioner,

Ted Bates & Company, Inc.

50 Federal Street

Boston 10, Massachusetts

Of Counsel:

JOSEPH A. MCMANUS

COUDERT BROTHERS

200 Park Avenue

New York 17, New York

H. THOMAS AUSTERN

COVINGTON & BURLING

701 Union Trust Building

Washington 5, D. C.

Dated: October 15, 1963

## [fol. 148] EXHIBIT A TO MEMORANDUM

Received July 18, 1963, Division of Appeals

**MATERIAL CERTIFIED TO COURT 7-15-63 in Docket  
7736 IN THE MATTER OF COLGATE-PALMOLIVE  
COMPANY, et al****Part 1****Pages**

1. Proposed order to cease and desist (CA1C having set aside order to cease and desist) and order allowing respondent 20 days after service of this order to file objections to proposed order, supporting statement and proposed alternative form of order; and order allowing counsel supporting complaint to file reply statement within ten days after service of alternative order, with opinion of commission—2-18-63 1-17
2. Motion by Colgate-Palmolive Company for extension of time for filing exceptions to proposed order—3-18-63 18
3. Motion by Ted Bates and Company, Inc. for extension of time for filing exceptions to proposed order—3-18-63 19
4. Order extending time for respondents to file exceptions to proposed order and for filing proposed alternative form of order—3-20-63 20
5. Exceptions by Colgate-Palmolive Company to proposed order, supporting statement and proposed alternative form of order—4-15-63 21-39
6. Exceptions by Ted Bates & Company, Inc. to proposed final order, statement of reasons in support and proposed alternative form of order—4-15-63 40-66
7. Answer by counsel supporting complaint to exceptions by respondents to proposed final order, statement and proposed alternative form of order—4-25-63 67-69
8. Order rejecting respondents' proposed alternative form of order and

**Final Order**

adopting, after modification, proposed final order and order to cease and desist, with opinion by Commission—5-7-63

70-75

*Part 1**Pages*

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\* \* \* \*

## IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ORDER OF COURT—October 21, 1963

Upon consideration of motion of respondent to incorporate the joint consolidated record appendix filed in Nos. 5972 and 5986, and of memoranda in opposition thereto, It is ordered that said motion be, and the same hereby is, denied.

By the Court:

/s/ Roger A. Stinchfield  
Clerk

### MINUTE ENTRY OF ARGUMENT—November 5, 1963

Thereafter, on November 5, 1963, this cause came on to be heard and was fully heard by the Court, Honorable Peter Woodbury, Chief Judge, and Honorable John P. Hartigan and Honorable Bailey Aldrich, Circuit Judges, sitting.

Thereafter, on December 17, 1963, the following opinion was filed:

[fol. 150]

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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No. 6145.

COLGATE-PALMOLIVE COMPANY, Petitioner

v.

FEDERAL TRADE COMMISSION, Respondent

---

No. 6146.

TED BATES & COMPANY, INC., Petitioner

v.

FEDERAL TRADE COMMISSION, Respondent

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ON PETITIONS TO REVIEW  
AN ORDER OF THE FEDERAL TRADE COMMISSION

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Before WOODBURY, *Chief Judge*, and HARTIGAN  
and ALDRICH, *Circuit Judges*

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*Mathias F. Correa*, with whom *Arthur Mermin*, *John F. Groden*, *Cahill*, *Gordon*, *Reindel & Ohl* and *Withington*, *Cross*, *Park & McCann* were on brief, for Colgate-Palmolive Company.

*Joseph A. McManus*, with whom *Lane McGovern*, *H. Thomas Austern*, *Alvin Friedman*, *David Falk*, *Coudert Brothers*, *Ropes and Gray* and *Covington & Burling* were on brief, for Ted Bates & Company, Inc.

*Philip B. Heyman*, Attorney, Department of Justice, with whom *James Mcl. Henderson*, General Counsel, *J. B. Truly*, Assistant General Counsel, and *Miles J. Brown*, Attorney, Federal Trade Commission, were on brief, for respondent.

[fol. 151]

OPINION OF THE COURT  
December 17, 1963

ALDRICH, *Circuit Judge*. In 1959 petitioner Colgate-Palmolive Company, at the suggestion of its advertising agency, petitioner Ted Bates & Company, ran a series of television commercials purporting to show, by moving pictures and dialogue, that Colgate's shaving cream Palmolive Rapid Shave was so "moisturizing" that it would permit "tough" (coarse) sandpaper to be "shaved" immediately with a safety razor. The Federal Trade Commission, after a hearing, found that the seeming sandpaper which had been photographed as being shaved in the studio was a plexiglass "mock-up"; that even fine sandpaper could not be shaved immediately; and that coarse paper could not be shaved until "moisturized" for an hour. There being a clear misrepresentation, the Commission entered orders forbidding the continuation of such, or similar, advertising. In addition it forbade, except for purely background purposes, all further undisclosed use of mock-ups.<sup>1</sup> Petitioners, respondents in the proceedings below and hereafter so termed, had made the point that technical problems and imperfections in the photographic process sometimes required the use of mock-ups in order to effect entirely correct reproductions on the screen.<sup>2</sup> The Commission held this to be irrelevant even

<sup>1</sup> For the broad scope of this order, applying to all "pictures, depictions, or demonstrations . . . not in fact genuine . . ." see our former opinion in this case, reported at 310 F.2d 89 (1962), and Judge Wisdom's discussion thereof in *Carter Products, Inc. v. F.T.C.*, 5 Cir., 1963, 323 F.2d 523.

<sup>2</sup> It is recognized, for example, that the brown color of iced tea disappears, so that it looks like water. Blue shirts must be worn to simulate natural white. The sand on sandpaper, it was found in this case, fails to reproduce, leaving an apparently plain surface. Some substances which may photograph correctly, such as ice cream or frosting, or the head on beer, melt under the hot lights. In other cases so many retakes may be required that even the actor might fade with repeated consumption of the advertised product. For these and similar reasons, physical properties must sometimes be "made up" or entirely replaced by "mock-ups" although the result is a faithful and accurate portrayal.

[fol. 152] though no quality, attribute, appearance of, or feat which could be performed by, the product was inaccurately represented. On a petition for review, over respondents' opposition which we found conspicuously unmeritorious, we agreed with the Commission that there had been a material misrepresentation of the cream's ability to shave sandpaper, and thus improper advertising. However, we agreed with respondents on the second aspect, and returned the case to the Commission for the formulation of a new order in accordance with our opinion. 310 F.2d at 95. Contending that the new order failed to comply with our expressed views, respondents are back with new petitions.

Prior to the issuance of its new order in final form the Commission handed down a fifteen-page opinion,<sup>3</sup> hereinafter the "second opinion," in which it recited that our "various suggestions" "in substantial part have been accepted." We reached a number of conclusions not labelled suggestions which the Commission was not free to disregard under the mandate. 15 U.S.C.A. § 45(i); see *Virginia Lincoln Furniture Corp. v. Commissioner*, 4 Cir., 1933, 67 F.2d 8 (comparable provision under the revenue acts); cf. *Morand Bros. Beverage Co. v. NLRB*, 7 Cir., 1953, 204 F.2d 529, 532, cert. den. 346 U.S. 909. Respondents assert that it has done so in substantial measure.<sup>4</sup>

<sup>3</sup> We mention the length of this opinion lest it be thought that the ambiguities we are about to discuss were due to cursory or ill-considered expression by the Commission. In fact the Commission wrote still a third opinion when it puts its present order in final form, and after respondents had asserted difficulties in interpretation. In this third opinion it said that it had now acted to "restate with clarity and precision the basis and breadth of our findings and order."

<sup>4</sup> See also, e.g., Note, *The Rapid Shave Case*, 38 Notre Dame Law. 350, 354 (1963). "The Commission has not capitulated, but has merely withdrawn to regroup its forces." The Commission's response is that if it has departed from our opinion it is because we misunderstood its original intention, due in large measure to "extreme arguments" made by its counsel. Because of this we asked present counsel whether he had cleared his argument with the Commission, and received an affirmative reply. The importance of this will shortly become apparent.



[fol. 153] But because much importance beyond this particular case has become attached to the Commission's antipathy to mock-ups, we will make an exception and re-examine its present<sup>5</sup> position on the merits rather than from the limited standpoint of whether it comports with our previous opinion.

The substance of the present order is contained in the following passage. Respondents are to cease and desist from,

"Unfairly or deceptively advertising any such product by presenting a test, experiment or demonstration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sale, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop instead of the product, article, or substance represented to be used therein."

If, to ascertain what is meant by "demonstration" and "actual proof" of a material claim, one turns to the second opinion, one learns that a "demonstration" is something which "prove[s] visually a quality claimed" for a product as distinguished from a "casual or incidental display" which is "not presented as proof of the . . . [quality] or appearance of the . . . [product], and thus in no practical [fol. 154] sense would have a material effect in inducing sales . . . ." In the view of the Commission this language "resolved" any "ambiguity." In the balance of its opinion, directed to the scope of the order, the Commission discussed examples of admittedly material misrepresentation, such as improper disparagement of a competitor, dis-

<sup>5</sup> There is so much in the Commission's second and third opinion about our having misunderstood its original position that we are not sure whether we now have before us a new position, or merely its old one "restated." See fn. 3, *supra*.

<sup>6</sup> The Commission rephrases this in its brief as the difference between a mock-up which "displays or illustrates a claim," and one that purportedly "objectively" "proves its truthfulness." As will be developed, we find this less than a clarification of what the Commission states (fn. 3, *supra*) was already "precise."

honest testimonials, misrepresentation of the seller's trade status, or of its receipt of an award or of prominent patronage, and concluded with the following footnote,

"... The misrepresentation would not have been greater or more material, but only more explicit, if the announcer had stated: 'this test is being made on real sandpaper, and not an artificial mock-up contrived to look like sandpaper.' The point is, whatever the technical photographic reasons justifying use of a mock-up, there could be no justification for the false presentation to the public of 'proof' that in fact was not proof."

At the oral argument, to test whether there was no ambiguity, we asked counsel for the Commission if an ice cream manufacturer showed an enlarged and appealing photograph of what was apparently rich, creamy ice cream which coincided exactly in appearance with its product, but was in fact a mock-up (see fn. 2, *supra*), it was not an attempt "to prove visually the quality . . . or appearance of the product" that might have a "material effect in inducing sales," and hence deceptive advertising. He replied this would be unobjectionable because "demonstration" in the Commission's order was to be read by the [fol. 155] rule of *ejusdem generis*, and meant demonstration "in the nature of a test or experiment."<sup>7</sup> He added that a buyer would be "morally disillusioned" if he learned that he had witnessed a phony test, but that a buyer of the ice cream would be indifferent to the use of the mock-up.<sup>8</sup> The important difference, the Commission asserts, is that in the case of a test, as distinguished from a display or illustration, the viewer believes he has seen "proof" which transcends the advertiser's "word."<sup>9</sup>

<sup>7</sup> See fn. 4, *supra*. The ice cream matter was dealt with less specifically in the second opinion, the Commission saying that such an illustration was proper if "incidental."

<sup>8</sup> In other words, to have seen simulated sandpaper wetted by shaving cream is less palatable than to have one's appetite whetted by emulsified cold cream.

<sup>9</sup> The Commission also claims that its toleration of such deception would be unfair to competitors. This would seem in this

While, as we said in our previous opinion, every undisclosed use of mock-up or make-up involves a "misrepresentation of a sort," we must consider the consequences of the Commission's order. In spite of the Commission's belief that it has resolved all ambiguities, we envisage great difficulty in determining any dividing line between what is and what is not a test or experiment, or in defining what is a demonstration in the nature of such. Primarily this may be because we find no substantial logical difference between what the Commission disapproves of and what it accepts. We do not see, for instance, why any pictorial representation of delicious-seeming ice cream is not intended to "prove visually the quality . . . or appearance" of the product. Or, to turn to the Commission's footnote, that the exhibitor does not impliedly say, "This is our ice cream," just as much as the implied announcement, "This is real sandpaper," is attributed to Colgate. [fol. 156] The issue of implication goes deeper. If a manufacturer exhibits a bed sheet, in fact blue, but apparently white, in connection with advertising its soap, is this depiction something which merely "displays or illustrates a claim," and therefore benign,<sup>10</sup> or does it (improperly) imply there has been a test? Even if it does imply a test, is this permissible since because this was not "verified or proved by an experiment performed before the eyes of the viewer" (Commission's brief) he cannot believe he has seen "proof" independent of the advertiser's "word?"<sup>11</sup> If the mere exhibition of the doctored sheet is not forbidden (provided the total effect is correct), would it become a "demonstration in the nature of a test" if the

context a mere restatement of the Commission's position rather than additional argument.

<sup>10</sup> See fn. 6, *supra*.

<sup>11</sup> In its first opinion the Commission said, "[A]n announcer may wear a blue shirt that photographs white; but he may not advertise a soap or detergent's 'whitening' qualities by pointing to the 'whiteness' of his blue shirt. The difference in all these cases is the time-honored distinction between a misstatement of truth that is material to the inducement of a sale and one that is not." We would hazard no guess as to the extent, if any, the Commission has now departed from this position.

sheet were shown being taken out of a washing machine? Again, if an adult may be pictured apparently enjoying allegedly delicious medicine (the Commission accepts fully the "I love Lipeom's" hypothetical in our earlier opinion, 310 F.2d at 93, n.7) does it become a test or a demonstration in the nature of a test if the supposed patient is so young that it may be thought that the smile of enjoyment was a spontaneous reaction? And if so, how young? Such questions, and others like them, may be readily put, not as the product of a fertile imagination, but as the result of ephemeral examination of current TV commercials.

The existence of such difficulties can only bring to mind the principle that an order must be capable of practical interpretation. *F.T.C. v. Henry Broch & Co.*, 1962, 368 [fol. 157] U.S. 360, 368.<sup>12</sup> The relative insignificance of the issue before us makes it particularly unwarranted to offend this principle. By hypothesis we are not talking about misrepresentation of any quality or appearance of the product, or whether it can or cannot perform the "test" which it is claimed to accomplish. We are considering no basic deception, but only the situation where, in illustrating faithfully a test which has been actually performed, an advertiser uses some foreign mock-up or make-up. As we stated in our previous opinion, so far as deceit is concerned the buyer is interested in what he thinks, he sees, and if what he buys can do and has done exactly what he thinks he sees it do, he has not been misled to any substantial degree.<sup>13</sup>

<sup>12</sup> While there is much meat in Jaffe, *The Judicial Enforcement of Administrative Orders*, 76 Harv. L. Rev. 865 (1963), we suspect that respondents would find little nourishment in the author's thesis that the courts may be counted on to neutralize, at the stage of adjudicating violation or imposing penalty, excesses by administrative bodies. Nor does the Commission's suggestion of advisory administrative opinions seem a ready solution. We think the very suggestion indicates the Commission's failure to realize the scope of the problem.

<sup>13</sup> In *O'Day Corp. v. Talman Corp.*, 1962, 310 F.2d 623, 626, n. 5, cert. den. 372 U.S. 977, we held that it was not unfair competition, where defendant sold, and could properly sell, a sailboat substantially identical to plaintiff's for defendant to use in its advertisements a picture which in fact was of plaintiff's boat instead of its own. While in that instance the boat was not "performing," we do not think the result would have been different if she had been photographed under sail if their performance was the same.

In seeking to stress the extent of misrepresentation by mock-up the Commission sometimes loses sight of the difference between a mock-up which presents an accurate portrayal and one, like Colgate's, that effects a basic deception, and at other times, in speaking of the buyer's "disillusionment," proceeds as if he would learn of the mock-up, but would not learn that no quality or characteristic of the product had been misrepresented.<sup>14</sup> Nor are [fol. 158] we impressed the strength of the previously mentioned difference that in a "genuine" test the viewer has more "proof" than the advertiser's "word." Even here there is usually a significant dependence upon the advertiser's word. We may take judicial notice that commercials are normally prerecorded. We may also assume, although the matter is not adverted to by the Commission, that the exhibition of a test implies that it can always be carried out, and not that this was the rare exception. The Commission has never opposed prerecordings; nor do we think it should; yet on this vital implication there is only the advertiser's word. We see little difference between this and taking his word that the test depicted is a faithful reproduction, in other respects.

The Commission's real objection, of course, is not to the resort to a mock-up, but to the implied representation that none is employed. This is apparent not only from the cases it regards apposite, which involved positive affirmations, such as that the manufacturer had (contrary to fact) received an award, or testimonials, or orders from certain customers, but also specifically from its conclusion that respondents' advertisement would be no worse, "only more explicit," if the announcer had affirmatively stated, "This is real sandpaper." The nub of this case, to return to our ice cream comparison, is either that Colgate impliedly says its depiction is real and the ice cream manufacturer does not, or that the

<sup>14</sup> We pointed out in our previous opinion there was a difference between claiming that one had received a certain testimonial when one had not, and merely reproducing (without disclosure) a copy of an actual testimonial because the original would not "photograph." The second opinion continues to talk only about the former.



misrepresentation is material in the case of the sandpaper, and harmless in the case of the ice cream. The Commission says the ice cream case is different, but, with all deference, we find its opinion, while long on generalities, short on analysis. It would seem paradoxical to say that a misrepresentation that what is shown is the [fol. 159] actual product is harmless while a misrepresentation as to something else is not. Yet we cannot see why if the representation is to be implied in one instance it is not in the other.

Under all the circumstances, we see only one practical solution. It is to hold that, in the absence of any express statement,<sup>15</sup> the only implied representation is that no basic dishonesty has been introduced into the picture by the photographic process. Such a principal would, we think, be of universal application, and would include all demonstrations whether in the nature of a test or otherwise. It would cover the situations we found troublesome in our previous opinion which the Commission has failed to discuss,<sup>16</sup> and every case of mock-up or make-up purporting to reproduce on the screen an exact representation of the qualities and appearance of the product, or, in the case of a claim of performance, of an actual test. If there is an accurate portrayal of the product's attributes or performance, there is no deceit. Such a principal may not be meticulously perfect, but we believe it would lead to minimum uncertainty and go more nearly to the heart of the matter.<sup>17</sup> It would also avoid the inroads into

<sup>15</sup> Contrary to the Commission, we believe it may, within limits, be more serious for the advertiser to misstate affirmatively the details of what is being shown than to imply them. The very fact of affirmation, as well as indicating an actual intent, dignifies the representation. Cf. *NLRB v. Tranco Chemical Corp.*, 1 Cir., 1962, 303 F.2d 456, 461: We would doubt, for instance, that if a manufacturer stated, "This is an actual unretouched photograph of our ice cream," the Commission would regard it as immaterial that the subject was a mock-up.

<sup>16</sup> E.g., a "genuine" demonstration in which the normal photographic process actually upgrades the product. See, also, fn. 14, *supra*.

<sup>17</sup> The Commission makes the point that such permissive use of mock-ups would greatly increase its policing difficulties. The Commission clearly has such duties, and considering the substantial man-



[fol. 160] the commercial's sixty seconds which would result from having to make the statement whenever mock-ups were used that the exhibition, though employing artificial aides, was a faithful portrayal of actual events, together with such other rehabilitating data as might be thought necessary to make the showing persuasive. While we do not make the basis of our decision, we reiterate our former observation that an enforced remedy should not outdistance the need.

The principle we espouse has no special relationship to mock-ups, and to amend the present order along such lines would serve no particular purpose. Accordingly, we instruct the Commission as we though we had directed it before, to enter an order confined to the facts of this case, where respondents used a mock-up to demonstrate something which in fact could not be accomplished. However, as to what terms the new order should contain with respect to products and customers, we did not, as the respondents seem to feel, direct the Commission to enter the narrowest possible order. There is more than one way to deal with a "single offense," cf. *All-Luminum Products, Inc.*, FTC 11/7/63, particularly a blatant one. We do agree with respondents that the Commission has been preoccupied with its broad opposition to mock-ups and has never expressed its views with respect to the proper scope of an order directed to more narrowly conceived substantive misconduct. In this situation we continue to believe that we should not comment on the precise terms of an order *in vacuo*. We will add, however, in view of the [fol. 161] strenuous opposition expressed by respondent Ted Bates & Company to the so-called "imposition of a

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ner in which respondents' mock-up departed from the truth and their insistence even in this court that there had been no misrepresentation, (see, also *Carter Products Inc. v. F.T.C.*, *supra*) we are sympathetic. There are, however, other solutions. For instance, there might be no objection to a properly formulated rule placing the burden of going forward (we do not mean burden of proof, cf. *United Aniline Co. v. Commissioner*, 1 Cir., 1963, 316 F.2d 701) upon a party who uses a mock-up or make-up to show that no basic deception, as we have been using the term, was accomplished thereby. This burden might be particularly heavy if there was no "photographic" reason for employing a substitute.

burden" of showing extenuation,<sup>18</sup> that respondent has misconceived the principle. The Commission has allowed it an escape, rather than imposed a burden. We see no reason why advertising agencies, which are now big business, should be able to shirk from at least prima facie responsibility for conduct in which they participate.

*Judgment will be entered setting aside the order of the Commission. Further proceedings to be in accordance with this opinion.*

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

DECREE—December 17, 1963.

This cause came on to be heard on petitions for review of an order of the Federal Trade Commission, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the Federal [fol. 162] Trade Commission is set aside and the cause is remanded for further proceedings in accordance with the opinion filed this day.

By the Court:

/s/ ROGER A. STINCHFIELD, Clerk.

Approved:

/s/ PETER WOODBURY, Ch.J.

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[fol. 163] [Clerk's Certificate to foregoing transcript omitted in printing.]

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<sup>18</sup> The same order was entered against Bates as against Colgate, but with respect to Bates there was a proviso that lack of knowledge, or of reason to know, of the existence of a mock-up would be a defense.

[fol. 164] **SUPREME COURT OF THE  
UNITED STATES**

No. —, *October Term, 1963*

**FEDERAL TRADE COMMISSION, Petitioner**

*vs.*

**COLGATE-PALMOLIVE CO., ET AL**

---

**ORDER EXTENDING TIME TO FILE PETITION FOR  
WRIT OF CERTIORARI—March 19, 1964**

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UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 15, 1964.

/s/ Arthur J. Goldberg  
ARTHUR J. GOLDBERG  
*Associate Justice of the Supreme  
Court of the United States.*

Dated this 19th day of March, 1964.

[fol. 165]

SUPREME COURT OF THE  
UNITED STATES*No. 1010, October Term, 1963*

FEDERAL TRADE COMMISSION, Petitioner

vs.

COLGATE-PALMOLIVE COMPANY, ET AL.

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ORDER ALLOWING CERTIORARI.—May 25, 1964.

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1963**

---

**No.**

**FEDERAL TRADE COMMISSION, PETITIONER**

**v.**

**COLGATE-PALMOLIVE COMPANY AND TED BATES  
& COMPANY, INC.**

---

## **PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the First Circuit, entered in this case on December 17, 1963.

### **OPINIONS BELOW**

The first opinion of the court of appeals (R. 37-46) <sup>1</sup> is reported at 310 F. 2d 89. The second opinion of the court of appeals (App. A, *infra*, pp. 19-30) is reported at 326 F. 2d 517. The first opinion of the Federal Trade Commission (R. 9-34) is reported at 59 F.T.C. 1452. The second and third opinions of the Commission (R. 50-65, 106-109) are not yet reported.

<sup>1</sup> "R" refers to Petitioners' Consolidated Record Appendix filed in the court of appeals in the second proceeding before that court.

**JURISDICTION**

The judgment of the court of appeals (App. B, *infra*, p. 31) was entered on December 17, 1963. On March 19, 1964, Mr. Justice Goldberg extended the time for filing a petition for a writ of certiorari to and including April 15, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**QUESTION PRESENTED**

Whether the Federal Trade Commission may prohibit, as an unfair or deceptive trade practice, the representation that a test, experiment, or similar demonstration shown on television provides the viewer with visual proof of a product claim (which may itself be true), when the test is a sham which proves nothing because of the undisclosed use of a "mock-up" in the test.

**STATUTE INVOLVED**

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S.C. 45, provides in part as follows:

(a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations \* \* \* from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

**STATEMENT**

The Commission's complaint charged respondents (an advertiser and its advertising agency) with having violated Section 5 of the Federal Trade Commission Act in connection with three 60-second television commercials for Rapid Shave shaving cream, which were widely broadcast on a national network in 1959 (R. 9). The advertisements are detailed in the Commission's first opinion (R. 10-12). They were described by the court of appeals as follows:

The commercial was a dramatic "audio" and "video" exposition in which sandpaper was apparently shaved with a safety razor with a single stroke immediately following the application of the cream. This demonstration, it was vocally claimed, "proved" the moisturizing qualities of the cream and that it would have the same effect "for you." In fact the demonstration did not employ sandpaper at all, but a simulated mock-up of sand on plexiglass, [R. 38]

On appeal from the hearing examiner's initial decision dismissing the complaint, the Commission, in an opinion by Commissioner Elman, concluded (1) that Rapid Shave could not shave sandpaper under the conditions depicted in the demonstration, and that respondents had therefore misrepresented the product's moisturizing qualities (R. 16); and (2) that, quite apart from the misrepresentation of the product's qualities, the undisclosed use of a mock-up in place of real sandpaper in the demonstration

was deceptive and unlawful (R. 19-23). Accordingly, the Commission entered an order both (1) forbidding respondents to misrepresent the quality or merits of Rapid Shave or any other shaving cream, and (2) forbidding them, "in describing, explaining, or purporting to prove the quality or merits of any product," to misrepresent "that pictures, depictions, or demonstrations \* \* \* are genuine or accurate representations \* \* \* of, or prove the quality or merits of" the product (R. 8).

On review, the Court of Appeals for the First Circuit, in an opinion by Judge Aldrich, set aside ~~the~~ Commission's order (R. 37-46). While fully sustaining the Commission's conclusion that respondents had misrepresented the qualities of Rapid Shave (R. 39-41), the court held that the Commission's order forbidding the undisclosed use of mock-ups in television commercials was too broad. It remanded the case for the Commission to draw a new order.

On remand, the Commission undertook in a second opinion to reconsider the entire case, restating the theory of law on which the "demonstration" part of the order was based and formulating an entirely new order responsive to the questions raised by the court of appeals (R. 50-65). The Commission stated:

At the outset, we must emphasize what this case does and does not involve. The basic facts have never been in dispute. Respondents, in their television commercials for Rapid Shave, were not content merely to claim that its "super-moisturizing power" was so great that it could shave sandpaper. Had the commercials been limited to that claim, the case would have

raised only the narrow factual issue of its truthfulness. Respondents saw fit to go much further and to "prove" the claim by "demonstrating" this purported quality of the product to the viewing public. Respondents were evidently aware that many viewers might not be willing to take their word for it that Rapid Shave could shave sandpaper. For those skeptical viewers, additional proof of the truthfulness of the claim was apparently thought necessary in order to sell the product. Respondents sought to exploit the popular belief that "the camera doesn't lie." By means of the "sandpaper test" demonstration, respondents in effect stated to the viewing public: "Do you doubt that Rapid Shave really can shave sandpaper, and suspect that we may be exaggerating its merits? Well, see for yourselves, and your doubts will disappear. Here is a piece of tough, dry sandpaper. Look at how quickly and cleanly Rapid Shave shaves it. And Rapid Shave can do the same for you, even if your beard is as tough as sandpaper." [R. 52-53]

The Commission emphasized that its decision did not forbid the use of mock-ups in television advertising under any and all circumstances:

The Commission did not have before it any abstract question whether the use of mock-ups in television advertising is, in all circumstances, *per se* illegal; or whether, in a casual or incidental display of a product that cannot be faithfully reproduced on the television screen because of technical deficiencies in the photographic process, it is permissible to use

substitute materials to overcome those deficiencies. Rather, a distinction was sought to be drawn between mock-ups that are used in demonstrations designed to prove visually a quality claimed for a product and are thus material to the selling power of the commercial, and those that are not. We entirely agree with the Court of Appeals, for example, that there is nothing objectionable in showing a person drinking what appears to be iced tea, but for technical photographic reasons is actually colored water, and saying "I love Lipsom's tea", assuming the appearance of the liquid is merely an incidental aspect of the commercial, is not presented as proof of the fine color or appearance of the tea; and thus in no practical sense would have a material effect in inducing sales of the product. [R. 55]

Paragraph I of the final order entered by the Commission on remand (after the Commission, in a third opinion (R. 106-09), again reconsidered the scope of the order) ordered respondent Colgate-Palmolive to cease and desist from:

Unfairly or deceptively advertising any such product by presenting a test, experiment or demonstration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sale, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop



instead of the product, article, or substance represented to be used therein. [R. 102-103].<sup>1</sup>

Respondents again sought review of the Commission's order, and the court of appeals again set aside the order and remanded the case. This time, however, the court directed the Commission to "enter an order confined to the facts of this case, where respondents used a mock-up to demonstrate something which in fact could not be accomplished" (App. A, *infra*, pp. 29-30).

The court did not limit its consideration to whether the Commission's decision on remand complied with the court's mandate; instead, it reexamined the Commission's position "on the merits" (App. p. 22). The court stated: "We are considering no basic deception, but only the situation where, in illustrating faithfully a test which has been actually performed, an advertiser uses some foreign mock-up or make-up. As we stated in our previous opinion, so far as deceit is concerned the buyer is interested in what he thinks he sees, and if what he buys can do and has done exactly what he thinks he sees it do, he has not been misled to any substantial degree" (App. p. 26). The court envisaged such "great difficulty in determining any dividing line between what is and what is not a test

<sup>1</sup>The order contains a similar provision directed against respondent Bates (except that the latter is specifically afforded a defense where it neither knows nor has reason to know that a mock-up was used in the test) (R. 103-04). It also forbids misrepresentations of product quality or merits, but that part of the order, as mentioned earlier, is apparently entirely acceptable to the court of appeals, and is not in issue before this Court on this petition for certiorari.

or experiment, or in defining what is a demonstration in the nature of such" (App. p. 24), that is concluded there was "only one practical solution. It is to hold that, in the absence of any express statement, the only implied representation is that no basic dishonesty has been introduced into the picture by the photographic process \* \* \*. If there is an accurate portrayal of the product's attributes or performance, there is no deceit". (App. pp. 28-29).

#### REASONS FOR GRANTING THE WRIT

As a result of the extended proceedings in this case, the issues have been narrowed to one: Whether under Section 5 of the Federal Trade Commission Act the Commission has the power to prevent the widespread use on television of advertising demonstrations that purport to furnish experimental proof of a product's quality or merits but in fact prove nothing because of the undisclosed substitution of a mock-up or other sham product in place of the articles that the demonstration falsely pretends to test. One way in which television's quality as a "live" medium has revolutionized advertising is by enabling the advertiser not merely to assert the merits of his product, but to provide "see for yourself" proof by tests, experiments, and other demonstrations. This is, accordingly, a test case of major importance with respect to the Commission's power to prevent deception in television advertising, in the interest of both the consuming public and honest advertisers.<sup>1</sup> In

<sup>1</sup> The case has received considerable attention in the law reviews. See Comment, 72 Yale L.J. 145 (1962); Note, 10 U.C.L.A. L. Rev. 417 (1963); 38 Notre Dame Lawyer 350 (1963);

addition, the court below exceeded the proper scope of judicial review by substituting its judgment concerning the application of the statutory standard of conduct and the framing of the appropriate relief for that of the agency charged with the administration of the Act.

1. The presentation of a picture of a sham performance with the representation that the viewer is watching an actual test is plainly an unfair or deceptive trade practice under established standards: It involves a deliberately false representation which is material in the sense that it furnishes an important inducement to sales. Honest advertising enables the consumer to make a free and informed choice among competing products, but the choice is impossible if one seller is permitted to misrepresent a fact that consumers consider material. As numerous decisions under the Federal Trade Commission Act make clear,<sup>\*</sup>

24 Ohio S.L.J. 558 (1963); 36 St. John's L. Rev. 274 (1962); 16 Vand. L. Rev. 977 (1963). It is, moreover, only one of a number of "demonstration" cases brought by the Commission. See *Hutchinson Chem. Corp.*, 55 F.T.C. 1942 (decided June 11, 1959); *Brown & Williamson Tobacco Corp.*, 56 F.T.C. 956 (consent order issued Feb. 24, 1960); *Libby-Owens-Ford Glass Co.*, F.T.C. Docket 7643 (decided July 16, 1963); *Aluminum Co. of America*, 58 F.T.C. 265 (consent order issued March 4, 1961); *Standard Brands, Inc.*, 56 F.T.C. 1491 (consent order issued June 1, 1960); *Lever Bros. Co.*, F.T.C. Docket 7747 (complaint dismissed Oct. 15, 1962); *Eversharp, Inc.*, 57 F.T.C. 841 (consent order issued Sept. 30, 1960); *Carter Products, Inc.*, F.T.C. Docket 7943 (decided April 25, 1962), reversed, 323 F. 2d 523 (C.A. 5); *The Mennen Company*, 58 F.T.C. 676 (consent order issued May 4, 1961).

<sup>\*</sup> See, e.g., *L. Heller & Sons, Inc. v. Federal Trade Commission*, 191 F. 2d 954 (C.A. 7) (failure to disclose country of origin of product); *Federal Trade Commission v. Standard Education Soc.*,

it is irrelevant whether the misrepresentation goes to the objective characteristics of the advertised product, or involves some extrinsic factor which is material because it influences the decisions of purchasers.<sup>5</sup> Regardless of the wisdom or folly of purchasers' grounds for preference, deception with regard to those matters is unlawful, for "the public is entitled to get what it chooses" (*Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 78). Thus, the unauthorized use of a "Good Housekeeping Seal" would be unfair and deceptive even if the product met the "Good Housekeeping" standards. *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F. 2d 337 (C.A. 7); see R. 59. The same would be true of a false representation that a disinterested testing agency had certified that a product had certain objective characteristics, even though the product could be shown to have them in fact.

86 F. 2d 692 (C.A. 2) (dishonest testimonials), modified, 302 U.S. 112; *Mohawk Refining Corp. v. Federal Trade Comm'n*, 263 F. 2d 818 (C.A. 3) (that product is reprocessed); *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212 (seller's trade status); *Steelco Stainless Steel, Inc. v. Federal Trade Comm'n*, 187 F. 2d 693 (C.A. 7) (false disparagement of competitors).

Such "extrinsic" frauds are not only deceptive, but also extremely unfair to the honest competitor who does not attempt to sell his products by concealing or misrepresenting material facts. "The Commission was not organized to drag the standards [of fair dealing] down" *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 79. As the Commission stated in its second opinion in this case, "It would be ironical indeed if businessmen who do not resort to material deceptions in advertising their products were forced, as a result of a decision of the governmental agency responsible for enforcing truth in advertising, to do so or suffer competitively" (R. 60).

The present case falls squarely within these established principles. The Commission found that the Rapid Shave sandpaper test was represented as visible proof of the moisturizing qualities claimed for Rapid Shave shaving cream, and the court of appeals did not disturb this finding. Unquestionably, the sandpaper test was an effective advertising device and a material factor in inducing purchases by many consumers. It was plainly intended as such an inducement. As the Commission's first opinion states:

[T]he pictorial test of "Rapid Shave," proving to any doubting Thomas in the vast audience that "By golly, it really *can* shave sandpaper!" was the clinching argument made by the commercials. The "sandpaper test" was conducted, as the announcer said, "[t]o prove Rapid Shave's super-moisturizing power. . . ." Without this visible proof of its qualities, some viewers might not have been persuaded to buy the product. At least, respondents must have thought so, or else they would not have emphasized the pictorial "sandpaper test" in the expensive television advertisements of their product. One need only consider the difference in the impact of these commercials on viewers had they been told, honestly and truthfully, that what they were seeing tested was a plexiglass mock-up, rather than what they thought and were told they were seeing, namely, actual sandpaper. The difference between telling and not telling the truth could, in this instance at least, have been the difference between an effective and ineffective "sell" [R. 22].

The visible proof was a sham. What appeared, and was expressly represented to millions of viewers to be sandpaper was actually a plexiglass mock-up. The viewers were not informed of the substitution even though what was represented as a test was no test at all and although the representation of "proof" would be material to their decision to buy Rapid Shave. The Commission's power to forbid such false and material representations has never depended upon a showing that the purposeful deception results in harm to the purchaser; the dishonesty of this method of selling alone condemns it.

2. In setting aside the Commission's order, the court below not only misconstrued the statute by sanctioning the false and material representation but it improperly substituted its judgment for that of the Federal Trade Commission on matters confided by the statute to the expert judgment of the agency. The court's decision rests on the following reasoning: The inherent limitations of television often require the use of mock-ups or other substitutes in order to portray accurately the appearance or uses of a product; it is difficult to distinguish those admittedly legitimate uses of mock-ups from the sham experiments and tests that the Commission's order would forbid; unless the false representation that an actual experiment or test is being conducted involves misrepresentation of the actual merits of the product, the harm to the public is minimal; therefore the "only \* \* \* practical solution" is to permit the sham experiments and tests so long as they involve "no



basic dishonesty" concerning the characteristics of the product.

We think it plain that it was for the Commission, not the reviewing court, to determine whether the harm done by permitting the continuance of this form of deception outweighs the possible gains from tolerating the pretended tests. In the words of Judge Learned Hand, "The Commission has a wide latitude in such matters; its powers are not confined to such practices as would be unlawful before it acted; they are more than procedural; its duty in part at any rate, is to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop."\* See also, *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643; *Federal Trade Commission v. R. F. Keppel & Bro.*, 291 U.S. 304; *Federal Trade Commission v. Standard Education Soc.*, 302 U.S. 112.

The Commission's determination that the harms of sham demonstrations outweigh the need for them is amply justified. The need is slight. The limitations of television may justify the undisclosed use of substitutes merely to portray a sponsor's product or illustrate its use, but no legitimate needs of sponsors justify the harm done by false representations that a sponsor is furnishing experimental proof of a product characteristic.<sup>7</sup> It is, of course, true that the techni-

\* *Federal Trade Commission v. Standard Education Soc.*, 86 F. 2d 692, 696 (C.A. 2), modified, 302 U.S. 112.

<sup>7</sup> The Commission's order does not reach the use of substitutes in television commercials which merely state and portray a product claim. It applies only to the presentation of "a

cal limitations of television may prevent a sponsor from showing on television an experiment which it can perform, and has performed elsewhere. But if the sponsor cannot prove its claim experimentally on television, it may still report and illustrate the tests it has performed elsewhere, so long as it lets the viewer know the truth—that he has only the sponsor's word and not visual proof to justify his belief in the sponsor's claim.

On the other hand, the harms of sham "proofs" are great. There can be no doubt that such statements, like representations that a product is being given away to selected persons, "give a competitive advantage to the less scrupulous seller and that they not only add nothing to the buyer's opportunities to buy wisely, but hold out to him false inducements." *Federal Trade Commission v. Standard Education Soc.*, 86 F. 2d at 696. Moreover, if sham experiments are permissible, television can never realize its potentiality as a medium through which those sellers of a superior product who can actually prove the truthfulness of their claims can convince buyers by performing bona fide tests or experiments before the eyes of the television viewer. For the viewer will not be able to distinguish the real experimental proof from the fake test and therefore will not be able to rely on any televised "demonstration" of superiority. There are additional harms as well. Because purchasers will pay test, experiment or demonstration that \* \* \* is represented to the public as actual proof of a claim made for the product" and, as the court below noted, the Commission has indicated that the word "demonstration" is "to be read by the rule of *ejusdem generis*" to mean "demonstration 'in the nature of a test or experiment'" (App. p. 23).

more for a product if they believe its characteristics have been verified before their eyes by a televised experiment, a fake experiment causes them to pay for something they do not receive—objective confirmation of the sponsor's claims. Finally, the dramatic impact of visual "proof" of a sponsor's claims is likely to induce purchasers to buy a product which they believe has been "tested" before their eyes on television rather than another which, were it not for the misrepresentation of "proof," they would have preferred."

The court below rested its decision in large part upon the problems of compliance, administration, and enforcement that it anticipated would be caused by the difficulties of distinguishing the prohibited misrepresentations of visual, experimental tests ~~claim~~ from the permitted uses of mock-ups or substitutes in other television commercials. But here, too, the judgment of the agency charged with administering the statute should have been accepted unless it was manifestly wrong; and here, too, the Commission's

<sup>8</sup> Thus, if a purchaser believes he has been shown experimental proof that a product has qualities A and B, he may prefer this product to another which claims, without proof, to have these qualities plus an additional quality (C) which he also values. Assuming that both products in fact have the qualities claimed for them, the misrepresentation of experimental proof causes the purchaser to receive less for his money than he should and unfairly deprives the competing seller of a sale he deserves. It is no answer either to the purchaser or to the disadvantaged competitor to say that the purchaser received a product with the qualities (A and B) he expected, for he would have purchased a different product and received more but for the misrepresentation of experimental proof.

judgment was more than justified. The crucial terms of the order—experiment, test, or similar demonstration purporting to furnish visual proof of a product characteristic—are, at the very least, as precise as those generally involved either in the law of tortious misrepresentation (e.g., the distinction between permitted representations of opinion and actionable representations of fact) or in the law of unfair trade practices (see, e.g., *Federal Trade Commission v. Rhodes Pharmacal Co.*, 348 U.S. 940). The Commission's order involves no more than the normal questions of interpretation that arise in the practical day-to-day application of every order or decree.\*

\* See *Vanity Fair Paper Mills, Inc. v. Federal Trade Comm'n*, 311 F. 2d 480, 487-488 (C.A. 2), where Judge Friendly pointed out that the compliance procedures of the Commission afford ample opportunity for clarification of the provisions of a cease and desist order without subjecting a respondent to the risks of a penalty proceeding. The Commission's revised Rules of Practice for Adjudicative Proceedings (28 Fed. Reg. 7080, 7091 (July 11, 1963)), which apply to this order, provide:

"Sec. 3.26(b) Any respondent subject to a Commission order may request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance with such order. The request for advice should be submitted in writing to the Secretary of the Commission and should include full and complete information regarding the proposed course of action. On the basis of the facts submitted, as well as other information available to the Commission, the Commission will inform the respondent whether or not the proposed course of action, if pursued, would constitute compliance with its order.

"(c) The Commission may at any time reconsider its approval of any report of compliance or any advice given under this section and, where the public interest requires, rescind or revoke its prior approval or advice. In such

Finally, the Commission could fairly conclude that the difficulties of defining sham demonstrations are less serious than the administrative difficulties presented by any alternative method of dealing with the problem, including that suggested by the court below (App. p. 29, n. 17).

#### CONCLUSION

This case presents questions of substantial importance in the administration of the Federal Trade Commission Act warranting review by this Court. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1964.

event the respondent will be given notice of the Commission's intent to revoke or rescind and will be given an opportunity to submit its views to the Commission. The Commission will not proceed against a respondent for violation of an order with respect to any action which was taken in good faith reliance upon the Commission's approval or advice under this section, where all relevant facts were fully, completely and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval."

APPENDIX A  
UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

No. 6145

COLGATE-PALMOLIVE COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 6146

TED BATES & COMPANY, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

On petitions to review an order of the Federal Trade  
Commission

Decided December 17, 1963

Before WOODBURY, Chief Judge, and HARTIGAN and  
ALDRICH, Circuit Judges

ALDRICH, *Circuit Judge*. In 1959 petitioner Colgate-Palmolive Company, at the suggestion of its advertising agency, petitioner Ted Bates & Company, ran a series of television commercials purporting to show, by moving pictures and dialogue, that Colgate's shaving cream Palmolive Rapid Shave was so "moisturizing" that it would permit "tough" (coarse) sandpaper to be shaved immediately with a safety razor. The Federal Trade Commission, after a hearing, found that the seeming sandpaper which had been photo-



graphed as being shaved in the studio was a plexiglass "mock-up"; that even fine sandpaper could not be shaved immediately; and that coarse paper could not be shaved until "moisturized" for an hour. There being a clear misrepresentation, the Commission entered orders forbidding the continuation of such, or similar, advertising. In addition it, forbad, except for purely background purposes, all further undisclosed use of mock-ups.<sup>1</sup> Petitioners, respondents in the proceedings below and hereafter so termed, had made the point that technical problems and imperfections in the photographic process sometimes required the use of mock-ups in order to effect entirely correct reproductions on the screen.<sup>2</sup> The Commission held this to be irrelevant even though no quality, attribute, appearance of, or feat which could be performed by, the product was inaccurately represented. On a petition for review, over respondents' opposition which we found conspicuously unmeritorious, we agreed with the Commission that there had been a material misrepresentation of the cream's ability to shave sand-

<sup>1</sup> For the broad scope of this order, applying to all "pictures, depictions, or demonstrations . . . not in fact genuine . . .," see our former opinion in this case, reported at 310 F. 2d 89 (1962), and Judge Wisdom's discussion thereof in *Carter Products, Inc. v. F.T.C.*, 5 Cir., 1963, 323 F. 2d 523.

<sup>2</sup> It is recognized, for example, that the brown color of iced tea disappears, so that it looks like water. Blue shirts must be worn to simulate natural white. The sand on sandpaper, it was found in this case, fails to reproduce, leaving an apparently plain surface. Some substances which may photograph correctly, such as ice cream or frosting, or the head on beer, melt under the hot lights. In other cases so many retakes may be required that even the actor might fade with repeated consumption of the advertised product. For these and similar reasons, physical properties must sometimes be "made up" or entirely replaced by "mock-ups" although the result is a faithful and accurate portrayal.

paper, and thus improper advertising. However, we agreed with respondents on the second aspect, and returned the case to the Commission for the formulation of a new order in accordance with our opinion. 310 F. 2d at 95. Contending that the new order failed to comply with our expressed views, respondents are back with new petitions.

Prior to the issuance of its new order in final form the Commission handed down a fifteen-page opinion,<sup>3</sup> hereinafter the "second opinion," in which it recited that our "various suggestions" "in substantial part have been accepted." We reached a number of conclusions not labelled suggestions which the Commission was not free to disregard under the mandate. 15 U.S.C.A. § 45(i); see *Virginia Lincoln Furniture Corp. v. Commissioner*, 4 Cir., 1933, 67 F. 2d 8 (comparable provision under the revenue acts); cf. *Morand Bros. Beverage Co. v. NLRB*, 7 Cir., 1953, 204 F. 2d 529, 532, cert. den. 346 U.S. 909. Respondents assert that it has done so in substantial measure.<sup>4</sup>

<sup>3</sup> We mention the length of this opinion lest it be thought that the ambiguities we are about to discuss were due to cursory or ill-considered expression by the Commission. In fact the Commission wrote still a third opinion when it put its present order in final form, and after respondents had asserted difficulties in interpretation. In this third opinion it said that it had now acted to "restate with clarity and precision the basis and breadth of our findings and order."

<sup>4</sup> See also, e.g., Note, *The Rapid Shave Case*, 38 Notre Dame Law. 350, 354 (1963), "The Commission has not capitulated, but has merely withdrawn to regroup its forces." The Commission's response is that if it has departed from our opinion it is because we misunderstood its original intention, due in large measure to "extreme arguments" made by its counsel. Because of this we asked present counsel whether he had cleared his argument with the Commission, and received an affirmative reply. The importance of this will shortly become apparent.

But because much importance beyond this particular case has become attached to the Commission's antipathy to mock-ups, we will make an exception and re-examine its present<sup>4</sup> position on the merits rather than from the limited standpoint of whether it comports with our previous opinion.

The substance of the present order is contained in the following passage. Respondents are to cease and desist from,

"Unfairly or deceptively advertising any such product by presenting a test, experiment or demonstration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sale, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop instead of the product, article, or substance represented to be used therein."

If, to ascertain what is meant by "demonstration" and "actual proof" of a material claim, one turns to the second opinion, one learns that a "demonstration" is something which "prove[s] visually a quality claimed" for a product as distinguished from a "casual or incidental display" which is "not presented as proof of the . . . [quality] or appearance of the . . . [product], and thus in no practical sense would have a material effect in inducing sales. . . ." In the view of

<sup>3</sup> There is so much in the Commission's second and third opinion about our having misunderstood its original position that we are not sure whether we now have before us a new position, or merely its old one "restated." See fn. 3, *supra*.

<sup>4</sup> The Commission rephrases this in its brief as the difference between a mock-up which "displays or illustrates a claim," and one that purportedly "objectively" "proves its truthfulness." As

the Commission this language "resolved" any "ambiguity." In the balance of its opinion, directed to the scope of the order, the Commission discussed examples of admittedly material misrepresentation, such as improper disparagement of a competitor, dishonest testimonials, misrepresentation of the seller's trade status, or of its receipt of an award or of prominent patronage, and concluded with the following footnote,

"... The misrepresentation would not have been greater or more material, but only more explicit, if the announcer had stated: 'this test is being made on real sandpaper, and not an artificial mock-up contrived to look like sandpaper.' The point is, whatever the technical photographic reasons justifying use of a mock-up, there could be no justification for the false presentation to the public of 'proof' that in fact was not proof."

At the oral argument, to test whether there was no ambiguity, we asked counsel for the Commission if an ice cream manufacturer showed an enlarged and appealing photograph of what was apparently rich, creamy ice cream which coincided exactly in appearance with its product, but was in fact a mock-up (see fn. 2, *supra*), it was not an attempt "to prove visually the quality . . . or appearance of the product" that might have a "material effect in inducing sales," and hence deceptive advertising. He replied this would be unobjectionable because "demonstration" in the Commission's order was to be read by the rule of *ejusdem generis*, and meant demonstration "in the nature of a test or experiment." He added that a

will be developed, we find this less than a clarification of what the Commission states (fn. 3, *supra*) was already "precise."

' See fn. 4, *supra*. The ice cream matter was dealt with less specifically in the second opinion, the Commission saying that such an illustration was proper if "incidental."

buyer would be "morally disillusioned" if he learned that he had witnessed a phony test, but that a buyer of the ice cream would be indifferent to the use of the mock-up.\* The important difference, the Commission asserts, is that in the case of a test, as distinguished from a display or illustration, the viewer believes he has seen "proof" which transcends the advertiser's "word."

While, as we said in our previous opinion, every undisclosed use of mock-up or make-up involves a "misrepresentation of a sort," we must consider the consequences of the Commission's order. In spite of the Commission's belief that it has resolved all ambiguities, we envisage great difficulty in determining any dividing line between what is and what is not a test or experiment, or in defining what is a demonstration in the nature of such. Primarily this may be because we find no substantial logical difference between what the Commission disapproves of and what it accepts. We do not see, for instance, why any pictorial representation of delicious-seeming ice cream is not intended to "prove visually the quality . . . or appearance" of the product. Or, to turn to the Commission's footnote, that the exhibitor does not impliedly say, "This is our ice cream," just as much as the implied announcement, "This is real sandpaper," is attributed to Colgate.

The issue of implication goes deeper. If a manufacturer exhibits a bed sheet, in fact blue, but ap-

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\* In other words, to have seen simulated sandpaper wetted by shaving cream is less palatable than to have one's appetite whetted by emulsified cold cream.

\* The Commission also claims that its toleration of such deception would be unfair to competitors. This would seem in this context a mere restatement of the Commission's position rather than additional argument.



parently white, in connection with advertising its soap, is this depiction something which merely "displays or illustrates a claim," and therefore benign,<sup>10</sup> or does it (improperly) imply there has been a test? Even if it does imply a test, is this permissible since because this was not "verified or proved by an experiment performed before the eyes of the viewer" (Commission's brief) he cannot believe he has seen "proof" independent of the advertiser's "word?"<sup>11</sup> If the mere exhibition of the doctored sheet is not forbidden (provided the total effect is correct), would it become a "demonstration in the nature of a test" if the sheet were shown being taken out of a washing machine? Again, if an adult may be pictured apparently enjoying allegedly delicious medicine (the Commission accepts fully the "I love Lipsom's" hypothetical in our earlier opinion, 310 F. 2d at 93, n. 7) does it become a test or a demonstration in the nature of a test if the supposed patient is so young that it may be thought that the smile of enjoyment was a spontaneous reaction? And if so, how young? Such questions, and others like them, may be readily put, not as the product of a fertile imagination, but as the result of ephemeral examination of current TV commercials.

The existence of such difficulties can only bring to mind the principle that an order must be capable of

<sup>10</sup> See fn. 6, *supra*.

<sup>11</sup> In its first opinion the Commission said, "[A]n announcer may wear a blue shirt that photographs white; but he may not advertise a soap or detergent's 'whitening' qualities by pointing to the 'whiteness' of his blue shirt. The difference in all these cases is the time-honored distinction between a misstatement of truth that is material to the inducement of a sale and one that is not." We would hazard no guess as to the extent, if any, the Commission has now departed from this position.



practical interpretation. *F.T.C. v. Henry Broch & Co.*, 1962, 368 U.S. 360, 368.<sup>12</sup> The relative insignificance of the issue before us makes it particularly unwarranted to offend this principle. By hypothesis we are not talking about misrepresentation of any quality or appearance of the product, or whether it can or cannot perform the "test" which it is claimed to accomplish. We are considering no basic deception, but only the situation where, in illustrating faithfully a test which has been actually performed, an advertiser uses some foreign mock-up or make-up. As we stated in our previous opinion, so far as deceit is concerned the buyer is interested in what he thinks he sees, and if what he buys can do and has done exactly what he thinks he sees it do, he has not been misled to any substantial degree.<sup>13</sup>

In seeking to stress the extent of misrepresentation by mock-up the Commission sometimes loses sight of the difference between a mock-up which presents an accurate portrayal and one, like Colgate's, that effects

<sup>12</sup> While there is much meat in Jaffe, *The Judicial Enforcement of Administrative Orders*, 76 Harv. L. Rev. 865 (1963), we suspect that respondents would find little nourishment in the author's thesis that the courts may be counted on to neutralize, at the stage of adjudicating violation or imposing penalty, excesses by administrative bodies. Nor does the Commission's suggestion of advisory administrative opinions seem a ready solution. We think the very suggestion indicates the Commission's failure to realize the scope of the problem.

<sup>13</sup> In *O'Day Corp. v. Talman Corp.*, 1962, 310 F. 2d 623, 626, n. 5, cert. den. 372 U.S. 977, we held that it was not unfair competition, where defendant sold, and could properly sell, a sailboat substantially identical to plaintiff's, for defendant to use in its advertisements a picture which in fact was of plaintiff's boat instead of its own. While in that instance the boat was not "performing," we do not think the result would have been different if she had been photographed under sail if their performance was the same.

a basic deception, and at other times, in speaking of the buyer's "disillusionment," proceeds as if he would learn of the mock-up, but would not learn that no quality or characteristic of the product had been misrepresented." Nor are we impressed with the strength of the previously mentioned difference that in a "genuine" test the viewer has more "proof" than the advertiser's "word." Even here there is usually a significant dependence upon the advertiser's word. We may take judicial notice that commercials are normally prerecorded. We may also assume, although the matter is not adverted to by the Commission, that the exhibition of a test implies that it can always be carried out, and not that this was the rare exception. The Commission has never opposed pre-recordings, nor do we think it should, yet on this vital implication there is only the advertiser's word. We see little difference between this and taking his word that the test depicted is a faithful reproduction in other respects.

The Commission's real objection, of course, is not to the resort to a mock-up, but to the implied representation that none is employed. This is apparent not only from the cases it regards apposite, which involved positive affirmations, such as that the manufacturer had (contrary to fact) received an award, or testimonials, or orders from certain customers, but also specifically from its conclusion that respondents' advertisement would be no worse, "only more explicit," if the announcer had affirmatively stated, "This

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"We pointed out in our previous opinion there was a difference between claiming that one had received a certain testimonial when one had not, and merely reproducing (without disclosure) a copy of an actual testimonial because the original would not "photograph." The second opinion continues to talk only about the former.

is real sandpaper." The nub of this case, to return to our ice cream comparison, is either that Colgate impliedly says its depiction is real and the ice cream manufacturer does not, or that the misrepresentation is material in the case of the sandpaper, and harmless in the case of the ice cream. The Commission says the ice cream case is different, but, with all deference, we find its opinion, while long on generalities, short on analysis. It would seem paradoxical to say that a misrepresentation that what is shown is the actual product is harmless while a misrepresentation as to something else is not. Yet we cannot see why if the representation is to be implied in one instance it is not in the other.

Under all the circumstances, we see only one practical solution. It is to hold that, in the absence of any express statement,<sup>14</sup> the only implied representation is that no basic dishonesty has been introduced into the picture by the photographic process. Such a principle would, we think, be of universal application, and would include all demonstrations whether in the nature of a test or otherwise. It would cover the situations we found troublesome in our previous opinion which the Board has failed to discuss,<sup>15</sup> and every case of mock-up or make-up

<sup>14</sup> Contrary to the Commission, we believe it may, within limits, be more serious for the advertiser to misstate affirmatively the details of what is being shown than to imply them. The very fact of affirmation, as well as indicating an actual intent, dignifies the representation. Cf. *NLRB v. Trancoa Chemical Corp.*, 1 Cir., 1962, 303 F. 2d 456, 461. We would doubt, for instance, that if a manufacturer stated, "This is an actual unretouched photograph of our ice cream," the Commission would regard it as immaterial that the subject was a mock-up.

<sup>15</sup> E.g., a "genuine" demonstration in which the normal photographic process actually upgrades the product. See, also, fn. 14, *supra*.

purporting to reproduce on the screen an exact representation of the qualities and appearance of the product, or, in the case of a claim of performance, of an actual test. If there is an accurate portrayal of the product's attributes or performance, there is no deceit. Such a principle may not be meticulously perfect, but we believe it would lead to minimum uncertainty and go more nearly to the heart of the matter.<sup>17</sup> It would also avoid the inroads into the commercial's sixty seconds which would result from having to make the statement whenever mock-ups were used that the exhibition, though employing artificial aids, was a faithful portrayal of actual events, together with such other rehabilitating data as might be thought necessary to make the showing persuasive. While we do not make this the basis of our decision, we reiterate our former observation that an enforced remedy should not outdistance the need.

The principle we espouse has no special relationship to mock-ups, and to amend the present order along such lines would serve no particular purpose. Accordingly, we instruct the Board, as we thought we had directed it before, to enter an order confined to

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<sup>17</sup> The Commission makes the point that such permissive use of mock-ups would greatly increase its policing difficulties. The Commission clearly has such duties, and considering the substantial manner in which respondents' mock-up departed from the truth and their insistence even in this court that there had been no misrepresentation (see, also *Carter Products Inc. v. F.T.C.*, *supra*) we are sympathetic. There are, however, other solutions. For instance, there might be no objection to a properly formulated rule placing the burden of going forward (we do not mean burden of proof, *cf. United Aniline Co. v. Commissioner*, 1 Cir., 1963, 316 F.2d 701) upon a party who uses a mock-up or make-up to show that no basic deception, as we have been using the term, was accomplished thereby. This burden might be particularly heavy if there was no "photographic" reason for employing a substitute.

the facts of this case, where respondents used a mock-up to demonstrate something which in fact could not be accomplished. However, as to what terms the new order should contain with respect to products and customers, we did not, as the respondents seem to feel, direct the Commission to enter the narrowest possible order. There is more than one way to deal with a "single offense," cf. *All-Luminum Products, Inc.*, FTC 11/7/63, particularly a blatant one. We do agree with respondents that the Commission has been preoccupied with its broad opposition to mock-ups and has never expressed its views with respect to the proper scope of an order directed to more narrowly conceived substantive misconduct. In this situation we continue to believe that we should not comment on the precise terms of an order *in vacuo*. We will add, however, in view of the strenuous opposition expressed by respondent Ted Bates & Company to the so-called "imposition of a burden" of showing extenuation,<sup>18</sup> that respondent has misconceived the principle. The Commission has allowed it an escape, rather than imposed a burden. We see no reason why advertising agencies, which are now big business, should be able to shirk from at least *prima facie* responsibility for conduct in which they participate.

*Judgment will be entered setting aside the order of the Commission. Further proceedings to be in accordance with this opinion.*

A true copy:

Attest: [S] ROGER A. STINCHFIELD, Clerk.

<sup>18</sup> The same order was entered against Bates as against Colgate, but with respect to Bates there was a proviso that lack of knowledge, or of reason to know, of the existence of a mock-up would be a defense.

**APPENDIX B**  
**UNITED STATES COURT OF APPEALS FOR**  
**THE FIRST CIRCUIT**

**No. 6145**

**COLGATE-PALMOLIVE COMPANY, PETITIONER,**

**v.**

**FEDERAL TRADE COMMISSION, RESPONDENT**

**No. 6146**

**TED BATES & COMPANY, INC., PETITIONER**

**v.**

**FEDERAL TRADE COMMISSION, RESPONDENT**

**DECREE**

**December 17, 1963**

This cause came on to be heard on petitions for review of an order of the Federal Trade Commission, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the Federal Trade Commission is set aside and the cause is remanded for further proceedings in accordance with the opinion filed this day.

By the Court:

[S] ROGER A. STINCHFIELD, *Clerk.*

A true copy:

Attest: ROGER A. STINCHFIELD, *Clerk.*

(31)



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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

FEDERAL TRADE COMMISSION,

*Petitioner,*

COLGATE-PALMOLIVE COMPANY and  
TED BATES & COMPANY, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIRST CIRCUIT.

## BRIEF FOR RESPONDENT COLGATE-PALMOLIVE COMPANY IN OPPOSITION.

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*Colgate-Palmolive Company.*

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May, 1964.

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No. 1010.

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1963

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FEDERAL TRADE COMMISSION,

Petitioner,

v.

COLGATE-PALMOLIVE COMPANY and TED BATES &  
COMPANY, INC.,

Respondents.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.*

---

**BRIEF FOR RESPONDENT COLGATE-  
PALMOLIVE COMPANY IN  
OPPOSITION.**

This brief is submitted by Colgate-Palmolive Company (hereinafter "Colgate") in opposition to the petition for a writ of certiorari to review the decree of the Court of Appeals for the First Circuit entered on December 17, 1963.

**Opinions Below.**

The first opinion of the Court of Appeals is reported at 310 F. 2d 89 (R. 37 ff.).\* The second opinion of the Court of Appeals is reported at 326 F. 2d 517 (Pet. App.

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\* Reference is thus made throughout to "Petitioners' Consolidated Record Appendix" filed in the second proceeding before the Court of Appeals and in this Court.

A).<sup>\*</sup> The first opinion of the Federal Trade Commission is reported at 59 F. T. C. 1452 (R. 9 ff.). The second and third opinions of the Commission appear at R. 50 ff. and R. 106 ff., respectively.

### **Jurisdiction.**

Jurisdictional requisites are set forth in the petition.\*\*

### **Question Presented.**

Whether a television advertisement communicating a completely truthful claim as to the quality or merits of a product is illegal under the Federal Trade Commission Act solely because of the undisclosed use of a mock-up or prop.

### **Statute Involved.**

The petition sets forth a portion of Section 5(a) of the Federal Trade Commission Act. Section 5(i) provides as follows:

“If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of

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<sup>\*</sup> Reference is thus made throughout to the petition for certiorari and the second opinion of the Court of Appeals appended thereto.

<sup>\*\*</sup> See, however, Point III hereof.



thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected." (15 U. S. C. §45(i)).

### Statement.

This litigation involves three television advertisements used to promote the sale of Palmolive Rapid Shave, a product of Colgate. The advertisements, broadcast in 1959, illustrated the shaving of the human beard and the shaving of sandpaper after the application of Palmolive Rapid Shave. In place of sandpaper, the advertisements used a plastic "mock-up" to simulate sandpaper; as to this, the court below observed: "[A]s the examiner found on undisputed testimony here, the shaving of sandpaper, even when in fact accomplished, does not properly reproduce on television and must be simulated to be effective" (R. 43).

The Commission's complaint charged Colgate and its advertising agency, Ted Bates & Company, Inc., with violation of Section 5 of the Federal Trade Commission Act solely with respect to the portrayal of the shaving of sandpaper.

After hearing, the complaint was dismissed by the Hearing Examiner. The Commission reversed. It ruled, first, that the particular grade of sandpaper portrayed could not be shaved as easily and quickly as shown in the advertisements (a ruling with which the court below agreed and which is not embraced by the instant petition). The Commission ruled, second, that assuming sandpaper could be shaved precisely as shown in the advertisements, the use of a mock-up for sandpaper nevertheless constituted, by

itself, an independent violation of the Act. In the Commission's view, it was a material deception to demonstrate the shaving of sandpaper when the sandpaper depicted was not in fact sandpaper—even assuming the test could be performed on real sandpaper exactly as depicted (R. 14, 19-25).

This latter ruling raises the issue—the legality of what this brief terms a “truthful mock-up”—which the petition asks this Court to review. The Commission's resulting order forbade, *inter alia*, the use of truthful mock-ups in demonstrations proving the quality or merits of a product (R. 7-8).

On review, the Court of Appeals stated that “we consider this a rather trivial case” and suggested that “little injury was done to the public by respondents' representations” (R. 41). The court found that Colgate's “only offense was the making of a single misrepresentation about a single product”, i. e., the facility with which sandpaper could be shaved after application of Palmolive Rapid Shave (R. 46, 39-41).

The court also ruled, after thorough discussion, that the Commission committed “fundamental error” (R. 45) in banning mock-ups which produced a visual image in precise conformity with reality (R. 42-6). While the court recognized that there is “a misrepresentation, of a sort, in any substitution case”, it stated “But . . . the Commission has put the shoe on the wrong foot. What the viewers are interested in, and moved by, is what they see, not by the means” (R. 44).

The court specifically determined that truthful mock-ups are not materially deceptive:

“The Commission properly said that the customer is entitled to get what he is led to believe he will get, whether he is right or wrong in thinking it makes

a difference. But where the only untruth is that the substance he sees on the screen is artificial, and the visual appearance is otherwise a correct and accurate representation of the product itself, he is not injured. The viewer is not buying the particular substance he sees in the studio; he is buying the product. By hypothesis, when he receives the product it will be exactly as he understood it would be. There has been no material deceit" (R. 45).

The court held that a mock-up "demonstration" was not illegal *per se* and concluded, "Under our construction there is no showing of any 'method' or 'practice' in the sense discussed by the Commission in its opinion" (R. 46).

Having thus held that Colgate made a misrepresentation only as to the facility with which sandpaper could be shaved after the application of Palmolive Rapid Shave, the court directed the Commission to frame a new order limited to the Commission's usual remedies for the making of a single misrepresentation (R. 46). The court's decree ordered that further proceedings be in accordance with its opinion (R. 36).

The Commission did not seek reargument or certiorari, nor did the respondents. Without further briefs or oral argument, the Commission issued on the same record a second opinion and a proposed final order under date of February 18, 1963 (R. 47 ff.); the stated purpose of the Commission was to insure that further judicial review "not be clouded by uncertainty as to the basis and breadth of our decision" (R. 52). The opinion reasserted the view that a truthful mock-up was itself an independent violation of law when used in a "demonstration" (R. 56, 61).

Colgate filed with the Commission on April 15, 1963 exceptions to the second opinion and order which urged,

among other things, that the Commission was proposing to defy the court's mandate, which the Commission had not sought to modify or reverse (R. 68, 66-73).

The Commission then issued on May 7, 1963 a third order and accompanying memorandum opinion which reiterated the Commission's argument that a truthful mock-up when used in a "demonstration" violated the Act (R. 102 ff.). On June 6, 1963 Colgate filed with the Commission a motion to correct the third order, which the Commission denied on the ground that the motion was "based upon the mistaken premise that the Commission's final order is in conflict with the prior decision and mandate of the Court of Appeals for the First Circuit . . ." (R. 133-34, 127-34).

Colgate also filed on June 6, 1963 in the court below a Petition to Correct, Review and Set Aside the third order of the Commission (R. 110ff.).

After full briefing and oral argument, the court rendered on December 17, 1963 the opinion and decree which are the subject of the instant petition (Pet. Apps. A and B). The court noted that it was not certain whether there was now before it a "new" Commission position on mock-ups or its old one "restated" (Pet. App. A 22 n. 5)\*. It made plain that the Commission was not legally free to disregard the court's mandate, but went on to say that it would make an exception and would examine the Commission's "present position on the merits rather than from the lim-

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\* The court also took note of the intervening decision of the Court of Appeals for the Fifth Circuit which agreed with the court's first opinion on truthful mock-ups. *Carter Products, Inc. v. Federal Trade Commission*, 323 F. 2d 523 (5th Cir. 1963). (Pet. App. A 20 n. 1). The opinion of the Fifth Circuit states of the first opinion of the court below: "[W]e consider the standards worked out in that opinion well-reasoned, in keeping with principles established in non-television cases, and applicable to the case now before us" (323 F. 2d at 528).

ited standpoint of whether it comports with our previous opinion" (Pet. App. A 21-2).

The court reaffirmed its first holding that a truthful mock-up did not violate the Act:

"As we stated in our previous opinion, so far as deceit is concerned the buyer is interested in what he thinks he sees, and if what he buys can do and has done exactly what he thinks he sees it do, he has not been misled to any substantial degree. . . . If there is an accurate portrayal of the product's attributes or performance, there is no deceit" (Pet. App. A 26, 29).

The court reached this conclusion after careful reexamination of the Commission's theory. The court stated that the Commission was attempting a distinction between a truthful mock-up in a "demonstration" which "proves" visually a quality of the product and a truthful mock-up in a "demonstration" which does not "prove" visually such quality (Pet. App. A 22-25). After exploring the application of the attempted distinction to various examples in the Commission's opinions and examples of its own, the court held the distinction to be untenable and stated that "we find no substantial logical difference between what the Commission disapproves of and what it accepts" (Pet. App. A 24-25).\*

The court pointed out that the Commission had no objection to the use of a truthful mock-up in portraying rich-looking ice cream. This, the court found, was illogical: it was "paradoxical" to deem a truthful mock-up of the

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\* The court also noted that the Commission had not even discussed in its second and third opinions examples which the court's first opinion had found "troublesome", e.g., the enhancement by the technology of television of the actual product as seen by television viewers, and the use of a mock-up for a testimonial which could not technically be photographed (Pet. App. A 28 n. 16; R. 44, 45 n. 8).

product itself undeceptive, while deeming a truthful mock-up of sandpaper in a shaving cream advertisement to be violative of the Act (Pet. App. A 28).

The opinion went on to find that the Commission's order violated this Court's admonition, in *Federal Trade Commission v. Henry Broch & Co.*, 368 U. S. 360, that a Federal Trade Commission order of this nature be capable of practical interpretation (Pet. App. A 25-6).<sup>\*</sup> The court felt that the principle of the *Broch* case was particularly apposite here because of the "relative insignificance of the issue before us" (Pet. App. A 26). On the Commission's own hypothesis, the mock-up issue involved no misrepresentation of the quality or appearance of a product, for it assumed the product could in reality exactly perform the "test" portrayed. The case was one where "in illustrating faithfully a test which has been actually performed, an advertiser uses some foreign mock-up . . ." (*Ibid.*). The court also stated that the Commission exaggerated the situation; the Commission spoke of a buyer's "disillusionment" in learning of the use of a truthful mock-up, but failed to consider that the buyer would also learn that no quality or characteristic of the product had in fact been misrepresented (Pet. App. A 26-7).

The Commission's argument that its proposed doctrine was necessary to protect honest competitors (repeated at pp. 14-15 of the petition) was also treated. The court pointed out that this was merely a restatement of the Commission's position rather than an additional argument (Pet. App. A 24, n. 9). This argument assumes its conclusion and is completely circular.

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<sup>\*</sup> This Court stated in *Broch* that the severity of possible penalties made it necessary that Commission orders be "at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application" (368 U. S. at 367-68).



The court concluded that the only practical solution was a rule applicable to all demonstrations in the nature of a test or otherwise: namely, that a truthful mock-up is not itself materially deceptive unless an express statement were made that no mock-up was used (Pet. App. A 28). "If there is an accurate portrayal of the product's attributes or performance, there is no deceit" (Pet. App. A 29).

Having, once more "undercut the basis" for the Commission's order, the court "instruct[ed] the Commission, as we thought we had directed it before, to enter an order confined to the facts of this case . . ." (Pet. App. A 29-30). It left to the Commission, as it had in its first decision, the writing of the terms of an appropriate order within the limits of the opinion (*Ibid.*).

The instant petition for a writ of certiorari followed.

## ARGUMENT.

### I.

The views of the court below—expressed in two painstaking opinions—and those of the Court of Appeals for the Fifth Circuit are plainly correct. The Commission's position, unapproved by any court, has neither statutory nor logical basis and has inherent ambiguities condemned by this Court in the *Broch* case.

The petition cites cases on representations extrinsic to product quality to argue that the Commission's position is required by controlling law (pp. 9-10). The court below did not disagree with these cases, which stand for the proposition that a product must possess the attribute which materially induces its purchase. Indeed, the court considered these cases and applied their teaching (R. 44-5; Pet. App. A 23, 27-8). The court pointed out that, under the Com-

mission's own assumptions as to a truthful mock-up, a purchaser of Palmolive Rapid Shave would find that it had the very quality or attribute which the demonstration had depicted (R. 43-5, Pet. App. A 20, 26). The court did not disagree with the argument in the petition that television viewers should be entitled to rely on visual proof. As the court made clear, viewers are indeed entitled to such reliance and they would in fact be undeceived if they relied upon a mock-up which is, under the Commission's own assumptions, precisely accurate (R. 44-5, Pet. App. A 26-7).

Words like "sham" or "fake" do not advance the Commission's argument. The essential question is whether a viewer is deceived when he looks at a transmitted image which represents the real with perfect exactitude. The court held, correctly, that he is not.

The petition also argues that the court below was without power to overrule the Commission and tries to treat the mock-up issue as one of appropriate remedy (Pet. 12ff.). This misapprehends the court's analysis.

As is clear from the Statement, *supra*, both of the court's opinions hold that no material deceit\* occurs when a truthful mock-up is used in a demonstration (R. 45-6, Pet. App. A 26, 29). This is clearly a holding on a question of law: the basic legality of particular behavior under the Act. Indeed, the petition expressly admits this when it states elsewhere that "the Commission undertook in a second opinion to reconsider the entire case, restating the theory of law on which the 'demonstration' part of the order was based..." (Pet. 4).\*\* It was to this "theory of law" that the court addressed itself. It found it to be illogical. In so

\* The petition (and the Commission heretofore) does not question that it is "material" deceit which violates the Act.

\*\* The Commission used the same language in its second opinion: "Our opinion failed to spell out sufficiently the theory of law on which the order was based..." (R. 52).

doing, it functioned on matters of rationality and reasonableness traditionally within judicial review of administrative action. See *Social Security Board v. Nierotko*, 327 U. S. 358, 368-70.\*

For two additional reasons, it is particularly disingenuous for the petition to claim that the court improperly substituted its judgment concerning "the framing of the appropriate relief for that of the agency" (Pet. 9): (a) in both proceedings before it the court, disregarding the suggestions of respondents here, expressly left to the Commission the framing of an appropriate order (R. 45-6, Pet. App. A 30); and (b) the petition's reference to an "alternative method of dealing with the problem . . . suggested by the court below"\*\*\* (Pet. 17) neglects to state that the court's suggestion was in response to an argument made for the first time by Commission counsel at the time of the second proceeding, that truthful mock-ups would increase the policing problems of the Commission.

It is submitted that the court exercised a traditional judicial function on review, that it discharged that function correctly on the merits—and that, in its willingness to reexamine anew the Commission's second and third efforts, it displayed a courtesy and deference which the petition does not appreciate.

\* As stated in *Grace Line Inc. v. Federal Maritime Board*, 263 F. 2d 709, 711, 2d Cir. 1959:

"With respect to the scope of judicial review of administrative decisions, the cases are in agreement that there are minimal standards beyond which the courts cannot allow administrative bodies to go. The reviewing court must satisfy itself that the administrative decision has a 'rational' or 'reasonable' foundation in law [citing cases]; and when not so satisfied the court must reverse the administrative decision."

\*\* The court suggested a "properly formulated rule" shaped to evidentiary and other problems (Pet. App. A 29 n. 7). See Point II hereof.

## II.

The petition is also incorrect in its claim that it presents a "test case of major importance" (Pet. 8).

This claim is belied by the observations of the court below that this is "a rather trivial case" (R. 41), that it "may well be that little injury was done to the public by respondents' representations" (*Ibid.*), and that the issue as to which the Commission here seeks this Court's intervention is of "relative insignificance" (Pet. App. A 26).

Moreover, the court indicated that the Commission remains free to fashion a "properly formulated rule" about mock-ups (Pet. App. A 29 n. 17), thus intimating the Commission might gather and study facts about the use and need for mock-ups in television and pictorial advertising and thereafter frame guidelines for all advertisers (*cf. Procedures and Rules of Practice for the Federal Trade Commission*, 16 C. F. R. §§1.55, 1.56 (Oct. 24, 1963)). If, after such study, the Commission were still to adhere to its present position, that position can at that point be tested legally in the light of all relevant facts rather than on the meagre record of this adjudicatory proceeding.\*

Assuming *arguendo* that the mock-up issue were important, such procedure would seem especially called for. As Colgate pointed out below, the Commission's position is a midstream reversal of its previous publicly-announced policy. This was found as a fact by the Court of Appeals

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\* The Commission recently conducted a broad investigation of retail price advertising and thereafter issued general guides which in many respects differed sharply from the position it had previously taken in adjudicatory proceedings involving the same subject matter. Compare "Guides Against Deceptive Pricing", 29 Fed. Reg. 178 (1964) with *Baltimore Luggage Co. v. Federal Trade Commission*, 296 F. 2d 608 (4th Cir. 1961), *cert. denied*, 369 U. S. 860 and with *The Regina Corp. v. Federal Trade Commission*, 322 F. 2d 765 (3d Cir. 1963).

for the Fifth Circuit in the *Carter* case, *supra* p. 6. There the court said of the Commission's present position, "It was not always thus" and it went on to quote a statement made by former Chairman Kintner in November, 1959:

"We realize that it is often difficult to impart true life quality to a product when it is photographed for television \* \* \*

"Where the use of props does not result in a material deception, the Federal Trade Commission would have no reason to complain \* \* \*

"Obviously, we recognize that it is impossible to photograph ice cream properly under hot lights. If you have to use shaving cream to get the kind of head which is normal on a glass of beer, this probably would not represent a material deception, unless, of course, it was carried beyond a reasonable point. If a glass goblet glistens too much, we still aren't likely to be alarmed" (323 F. 2d at 529 n. 10, citing *Advertising Age*, Vol. 30 No. 47, p. 1, November 23, 1959).\*

Thus, the "important test case" claimed by the Commission is a policy change, made without notice or investigation and rebuffed by two Courts of Appeals. Under these circumstances, the Commission would have done better to decide that its hasty shift in policy merited further study by the Commission rather than a review by this Court.

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\* Colgate also pointed out below that in the same month of November, 1959 the Chairman and staff members of the Commission met with officers of the Association of National Advertisers, Inc. concerning Commission advertising policy. The report of the meeting states that it was reviewed by Chairman Kintner prior to its publication. The report states, *inter alia*, the following:

"F. T. C. recognizes a rule of reason. . . . A theatrical artifice, to be condemned by the Commission, must represent a material deception as to the characteristics, performance or appearance of a product. . . . In general, F. T. C. is not concerned with what goes on in the act of bringing a TV picture to the screen--rather they are concerned with what the viewer sees" (Special Report to A. N. A. Members, "A. N. A. Officers Meet With FTC to Seek Standards for TV Visual Presentation", November 24, 1959, p. 2).

Indeed, other action of the Commission is inconsistent with its contention that the mock-up issue is of major importance. After the *Carter* case, which also involved a shaving cream and the truthful mock-up issue, was remanded to it by the Court of Appeals for the Fifth Circuit, the Commission did not seek certiorari on the truthful mock-up question. Instead, the Commission issued, on December 6, 1963, a modified order which does not prohibit such mock-ups (*Carter Products, Inc.*, Dkt. 7943, issued Dec. 6, 1963 and released Dec. 27, 1963).

The Commission so acted in a "demonstration" case which the Commission had argued in its brief to the Fifth Circuit involved a more serious offense than that here. The Commission's *Carter* brief had pointed out that a technological reason for the use of a mock-up was not present in *Carter*. The brief had also argued that *Carter* involved disparagement of other shaving creams, whereas Colgate "was not in the business of selling sandpaper, and did not in any respect compete with those who do". These factors, said the brief, resulted in a "manifest—indeed, critical—dichotomy" between the two cases (Commission Brief, 27, 25-30). No reason has been proffered by the Commission for thereafter creating a new dichotomy between these cases wherein the instant situation has suddenly become worse in the Commission's view than that in *Carter*.

This lack of even-handedness—coupled with the unheralded change from a previous policy and the Commission's difficulties in the attempted creation of new doctrine manifested by its three opinions in this case—reveal serious confusion. It is submitted that the Commission does not present, and is not ready to present, a "test case" to this Court. The public interest would be served if the Commission were left free to consider the nuances of the truthful mock-up issue in an industry-wide perspective.



## III.

The confusion and weakness in the Commission's position is reflected also by the procedural aspects of the case.

The first decision of the court below was clear and explicit. It ruled flatly that the Commission was wrong on the very mock-up point the Commission seeks to argue to this Court. The Commission had initially specifically posed the question whether the sandpaper test, regardless of its accuracy, was an independent deceptive "practice" because it offered "proof" in a "demonstration" (R. 14). To this question, the first opinion of the court responded:

"The viewer is not buying the particular substance he sees in the studio; he is buying the product. By hypothesis, when he receives the product it will be exactly as he understood it would be. There has been no material deceit" (R. 45).

The court held expressly that Colgate had not pursued an illegal "practice":

"Under our construction there is no showing of any 'method' or 'practice' in the sense discussed by the Commission in its opinion" (R. 46).

That ended the matter. The Commission then was free, beginning November 20, 1962, to seek reargument or certiorari. It chose not to do so, but instead on its own motion issued new opinions based on reasoning which the court had already contradicted.

By filing the instant petition, the Commission claims the power to restate a position after remand and thereby to postpone the 90-day provisions of 28 U. S. C. §2101(c) as to a question already decided by a Court of Appeals. The Federal Trade Commission Act does not appear to

grant the Commission such special power. The court did not order or invite a rehearing; instead, it ordered that further proceedings be in accordance with its opinion (R. 35-6, 46). Accordingly, it is submitted that the Commission was governed by Section 5(i) of the Act, which contemplates that after remand a Commission order will be "rendered in accordance with the mandate of the court of appeals" and provides for later judicial proceedings confined to correction of the Commission's order so that it will accord with the mandate of the Court of Appeals.\*

Equally, this Court's decisions do not appear to have granted the Commission the special power it asserts. The Commission was told in *Federal Trade Commission v. Minneapolis-Honeywell Reg. Co.*, 344 U. S. 206, 213, that its certiorari petition was untimely and that "litigation must at some definite point be brought to an end."<sup>3</sup> That principle would seem to apply here. If the Commission could now properly seek certiorari on the merits of the truthful mock-up issue, it will have been able to secure, merely by rewriting its opinions, a double review from a Court of Appeals plus a review by this Court.<sup>4</sup> Such a result is unseemly. The Commission appears to be the only agency which has sought certiorari under such circumstances. The presentation of a case in so singular a procedural situation also argues against the grant of a writ.

\* See *Virginia Lincoln Furniture Corp. v. Commissioner*, 67 F. 2d 8 (4th Cir. 1933), cited by the court below as dealing with a "comparable provision under the revenue acts" (Pet. App. A 21). It may be noted that the petition does not seek to present a question whether the Commission's latest order conforms to the first mandate of the Court of Appeals; respondents would assert that such order does not comply with that mandate if certiorari were granted.

\*\* Cf. also *Brown Shoe Co. v. United States*, 370 U. S. 294, 308-9; *Chicago v. Atchison, Topeka & Santa Fe Ry.*, 357 U. S. 77, 83; *Department of Banking v. Pink*, 317 U. S. 264, rehearing denied, 318 U. S. 801; Stern and Gressman, *Supreme Court Practice*, Sec. 6-3, pp. 206-7 (3d ed. 1962).

**Conclusion.**

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May, 1964.

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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1963

FEDERAL TRADE COMMISSION, *Petitioner*,

COLGATE-PALMOLIVE COMPANY AND TED BATES &  
COMPANY, INC., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT TED BATES  
& COMPANY, INC.

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May, 1964

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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1963

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No. 1010

FEDERAL TRADE COMMISSION, *Petitioner*,

*v.*

COLGATE-PALMOLIVE COMPANY AND TED BATES &  
COMPANY, INC., *Respondents*

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J  
ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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**BRIEF IN OPPOSITION FOR RESPONDENT TED BATES  
& COMPANY, INC.**

**OPINIONS BELOW**

The first opinion of the Court of Appeals, reported at 310 F.2d 89, is found in Appendix A to this Brief (hereafter referred to as "Bates App."). The second opinion of the Court of Appeals, reported at 326 F.2d 517, is found in Appendix A to the Petition. The three opinions of the Federal Trade Commission are reproduced in the certified record of the proceedings below filed in this Court (R. 9, 50, 106).\*

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\* "R." refers to the certified record of the proceedings below filed in this Court.

**QUESTION PRESENTED**

Whether a television advertisement communicating a completely truthful claim as to the quality or merits of a product is illegal under the Federal Trade Commission Act solely because of the undisclosed use of a mock-up or prop.

**STATUTE INVOLVED**

Section 5(i) of the Federal Trade Commission Act, added by the Act of March 21, 1938, 52 Stat. 114, 15 U.S.C. § 45(i), provides as follows:

"If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected."

**STATEMENT OF THE CASE**

The Petition fails to state the facts completely. Respondent Ted Bates & Co. is therefore constrained to present a more accurate summary of the two orders and three opinions of the Federal Trade Commission and the two opinions and mandates of the Court of Appeals for the First Circuit.

In its first opinion, the Commission found two violations of law in the television advertisements for Rapid

Shave Shaving Cream (R. 9). The first, denominated by the Court below as the "single misrepresentation" (310 F.2d at 94, Bates App. 9a), indeed "trivial" (310 F.2d at 92, Bates App. 5a), was that respondents had misrepresented the moisturizing properties of Rapid Shave because the product could not perform as claimed in the advertisement. The claim that a piece of heavy, coarse sandpaper could be coated with Rapid Shave and then be promptly shaved clean with a safety razor was held to be false (R. 15-19).

The Commission went further. It concluded that even if that single claim for the product *were true*, the undisclosed use of a plastic mock-up, to simulate the sandpaper, would in and of itself be illegal (R. 19-26).<sup>\*</sup> As the Commission summarized its additional view, even if the claim of "effectiveness in shaving sandpaper" were true,

"... the commercials would be deceptive, within the meaning of the statute, in the manner in which they deliberately misinform the viewer that what he sees being shaved is genuine 'tough, dry sandpaper,' rather than a plexiglass mock-up" (R. 19).

The cease and desist order entered against the respondents by the Commission was in two parts, paral-

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\* A mock-up or prop is an object used in television commercials to simulate the appearance of another object and is frequently used because the simulated object cannot be telecast without substantial distortion. For example, what appears to the television viewer to be a white shirt is in fact a blue shirt. In this case, the Hearing Examiner stated in a finding quoted by the Commission, and not overruled by it, that "[w]hen placed under a television camera, sandpaper appears to be nothing more than plain, colored paper; the texture or grain of the sandpaper is not shown. Thus it is necessary to improvise—use a mock-up—if what is seen by the television audience is to have the appearance of sandpaper" (R. 12).

leling the two findings of misrepresentation (R. 7-8). One part prohibited the respondents from misrepresenting the "quality or merits" of Rapid Shave or of any other shaving cream. On appeal, the Court of Appeals held that the Commission had adequately found the facts justifying this part of the order—that Rapid Shave could not perform in shaving sandpaper as depicted in the advertisements—but suggested that, since "[r]espondents' only offense was the making of a single misrepresentation about a single product" (310 F.2d at 94, Bates App. 9a), the scope of the order was too broad.

On remand, the Commission revised this part of the order (R. 102-105). The respondents, on their second appeal, contended that these changes were insubstantial and consequently that the revised order was not in accordance with the direction of the Court. Accordingly, the Court of Appeals again returned this part of the order to the Commission for revision, for the reason that "the Commission has been preoccupied with its broad opposition to mock-ups and has never expressed its views with respect to the proper scope of an order directed to more narrowly conceived substantive misconduct" (326 F.2d at 523, Pet. App. 30).

This first part of the case is not now in issue. Under the Commission's Petition for Certiorari, the fact that Rapid Shave cannot shave sandpaper as represented in the advertisement is not in dispute, nor is any question raised as to what constitutes an appropriate order for the single instance of misrepresentation found. That issue, not here raised, remains for further consideration by the Commission, on remand, in accordance with the lower Court's direction.

The second part of the Commission's original cease and desist order was aimed at prohibiting what the Commission deemed to be "an unfair advertising practice" (R. 14, 30-34), namely, the undisclosed use of mock-ups even where the visual appearance of the qualities or merits of the product was itself accurate—where the claim made for the product was true. As written, this part of the original order prohibited the respondents from:

"Representing, directly or by implication, in describing, explaining, or purporting to prove the quality or merits of any product, that pictures, depictions, or demonstrations, either alone or accompanied by oral or written statements, are genuine or accurate representations, depictions, or demonstrations of, or prove the quality or merits of, any product, when such pictures, depictions, or demonstrations are not in fact genuine or accurate representations, depictions, or demonstrations of, or do not prove the quality or merits of, any such product" (R. 8).

Initially, the Court of Appeals, in an opinion written by Judge Bailey Aldrich, considered whether the meaning of this part of the order, relating to the use of props in making a truthful product claim, was uncertain. The Court, however, resolved the meaning of the order with the aid of statements from the Commission's first opinion and from Commission counsel's oral argument. The Court concluded that the order was intended to prohibit "any demonstration . . . if it was not 'genuine' in that the actual substance used in the studio . . . was not the product itself" (310 F.2d at 93, Bates App. 6a). The Court then held not, as stated in the Petition for Certiorari, that the order "was too broad" (Pet. 4), but that the order was

grounded upon a "fundamental error" of substance—the view that it is a misrepresentation and a violation of the Act to use a mock-up even where the claim being made for the advertised product is true (310 F.2d at 94, Bates App. 9a). Judge Aldrich stated the principle governing the case:

"But where the only untruth is that the substance [the viewer] sees on the screen is artificial, and the visual appearance is otherwise a correct and accurate representation of the product itself, he is not injured. The viewer is not buying the particular substance he sees in the studio; he is buying the product. By hypothesis, when he receives the product it will be exactly as he understood it would be. There has been no material deceit" (310 F.2d at 94, Bates App. 8a-9a).

The case was remanded for "[f]urther proceedings to be in accordance with this opinion" (310 F.2d at 95, Bates App. 10a).

The Commission did not petition this Court for a writ of certiorari to review that holding. Although the substantive issue of the legality of mock-ups used in making a truthful product claim—the issue now sought to be presented by the instant Petition—was then fully ripe for decision by this Court, the Commission on remand undertook instead to redraft its original order, to restate its meaning and scope, and to repeat its underlying legal basis.

The order as thus reformulated forbade:

"Unfairly or deceptively advertising any [product sold in commerce] by presenting a test, experiment or demonstration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sale,



and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop instead of the product, article, or substance represented to be used therein" (R. 102-104).

This order, as conceded by the Commission in its Petition (Pet. 2), applies even though the product claim is completely truthful.

In its second opinion, on remand, the Commission denied that its initial order, and its second order, as redrafted, made every use of mock-ups in television advertising *per se* illegal (R. 55).

"Rather, a distinction was sought to be drawn between mock-ups that are used in demonstrations designed to prove visually a quality claimed for a product and are thus material to the selling power of the commercial, and those that are not. We entirely agree with the Court of Appeals, for example, that there is nothing objectionable in showing a person drinking what appears to be iced tea, but for technical photographic reasons is actually colored water, and saying 'I love Lipton's tea', assuming the appearance of the liquid is merely an incidental aspect of the commercial, is not presented as proof of the fine color or appearance of the tea, and thus in no practical sense would have a material effect in inducing sales of the product" (R. 55).\*

Thus, the Commission bluntly refused to accept the Court of Appeals' holding that mock-ups may be used

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\* The third opinion by the Commission was rendered to accompany the Commission's rejection of the respondents' objections to the Commission's second order (R. 106).

if they truthfully communicate a product's qualities and merits.

The respondents again sought review in the Court of Appeals for the First Circuit, arguing that the new order of the Commission once again, albeit in slightly different language, prohibited the undisclosed use of mock-ups to make truthful product claims, and therefore plainly flouted the decision and mandate of the Court. Judge Aldrich, writing once more for the Court, agreed that the issue on the appeal was whether the new order of the Commission was in accord with the mandate of the Court. In again upsetting the Commission's order, he wrote that in the first decision the Court of Appeals had "reached a number of conclusions not labelled suggestions which the Commission was not free to disregard under the mandate" (326 F.2d at 519, Pet. App. 21). Nevertheless, the Court decided to "make an exception and re-examine [the Commission's] present position on the merits rather than from the limited standpoint of whether [the order] comports with our previous opinion" (326 F.2d at 519, Pet. App. 22).

Judge Aldrich then wrestled with the meaning of the Commission's reformulated order. On the basis of what the Commission wrote in its second and third opinions (R. 50, 106), Judge Aldrich confessed that "we are not sure whether we now have before us a new position, or merely its old one 'restated'" (326 F.2d at 519 n.5, Pet. App. 22 n.5). He noted that at the oral argument Commission counsel, with prior approval from the Commission (326 F.2d at 519 n.4, Pet. App. 21 n.4), had informed the Court that the word "demonstration" in the phrase "test, experiment or demonstration" in the order "was to be read by the

rule of *ejusdem generis*, and meant demonstration 'in the nature of a test or experiment' " (326 F.2d at 520, Pet. App. 23).

Even with Commission counsel's gloss on the order, Judge Aldrich did not know how the order could be given any practicable application. The first difficulty was in differentiating a test, experiment or demonstration in the nature of a test or experiment, where under the Commission's order mock-ups could not be used, from other situations in which mock-ups were not to be prohibited (326 F.2d at 521, Pet. App. 24). In addition, Judge Aldrich could discern no logical reason why mock-ups should be permitted in the one class of cases and prohibited in the other; that is, why seeing a mock-up of ice cream (really emulsified cold cream) which gives an accurate visual image demonstrating the rich and savory qualities that the ice cream actually possesses, is any different from seeing a mock-up of sandpaper being shaved when the shaving cream can in fact aid in shaving sandpaper as depicted (326 F.2d at 520, 522, Pet. App. 24, 28). These difficulties with the Commission's order impelled Judge Aldrich to reaffirm the basic principle already set forth in the first opinion: "If there is an accurate portrayal of the product's attributes or performance, there is no deceit" (326 F.2d at 523, Pet. App. 29). And he concluded with the following instruction:

"Accordingly, we instruct the Commission, *as we thought we had directed it before*, to enter an order confined to the facts of this case, where respondents used a mock-up to demonstrate something which in fact could not be accomplished" (326 F.2d at 523, Pet. App. 29-30) (emphasis supplied).

The Court of Appeals has thus twice rejected the Commission's claim that mock-ups may not be used in demonstrations even if the qualities and merits of the product being demonstrated are accurately communicated.

#### REASONS FOR DENYING THE WRIT

The Federal Trade Commission has petitioned for a writ of certiorari to review a question raised by one part of a cease and desist order that has taken the Commission two orders and three opinions to articulate and yet has twice been reversed by the Court of Appeals for the First Circuit. The respondent respectfully submits that there are substantial reasons why this is not an appropriate case for review by the Supreme Court.

#### I.

##### THERE IS NO CONFLICT IN CIRCUITS

The Petition proceeds upon the premise that, even where the product claims made in advertisements using mock-ups are fully accurate and true, they may be proscribed under the Act. As tendered to this Court, the legal issue concerns the power of the Commission to prohibit the use of mock-ups in making true claims. This attack by the Commission upon the use of mock-ups and props in television advertising to make truthful claims about products is a novel theory of law without support from any prior decision of the Commission or of any court.

The cases cited by the Commission in its petition (Pet. 8 n.3) all involved television tests, experiments,

and demonstrations that the Commission claimed *misrepresented* the qualities or merits of the advertised product, either because the product would not in fact perform as represented,\* because the test or experiment could not in fact be performed as represented,\*\* or because the test or experiment bore no reasonable relationship to the quality or merit claimed for the product.\*\*\*

In only two of these cases were the orders of the Commission designed to prohibit the undisclosed use of mock-ups even where the claim made for the product is truthful. The order in one of these cases, *Libby-Owens-Ford Glass Co.*, F.T.C. Docket 7643 (July 16, 1963), is presently on appeal to the Court of Appeals for the Sixth Circuit. The order in the other, *Carter Products, Inc.*, F.T.C. Docket 7943 (April 25, 1962), a case involving a shaving cream competitive with Rapid Shave, was set aside by the Court of Appeals for the Fifth Circuit, 323 F.2d 523 (5th Cir. 1963). In the *Carter* case, in an opinion written by Judge Wisdom, the first opinion of the Court of Appeals in the present case was specifically followed. Judge Wisdom characterized that opinion as "well-reasoned, in keeping with principles established in non-television

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\* *Brown & Williamson Tobacco Corp.*, 56 F.T.C. 956 (1960); *Standard Brands, Inc.*, 56 F.T.C. 1491 (1960).

\*\* *Aluminum Co. of America*, 58 F.T.C. 265 (1961); *Carter Products, Inc.*, F.T.C. Docket 7943 (April 25, 1962) *order set aside*, 323 F.2d 523 (5th Cir. 1963); *Libby-Owens-Ford Glass Co.*, F.T.C. Docket 7643 (July 16, 1963).

\*\*\* *Hutchinson Chemical Corp.*, 55 F.T.C. 1942 (1959); *Ever-sharp, Inc.*, 57 F.T.C. 841 (1960); *The Mennen Co.*, 58 F.T.C. 676 (1961); *Lever Bros. Co.*, F.T.C. Docket 7747 (October 15, 1962).

cases, and applicable to the case now before us." 323 F.2d at 528.

Even more striking, on remand, the Commission in *Carter* acceded to the decision and mandate of the Fifth Circuit (unlike its action on remand in the present case), and entered an order that does not prohibit the use of mock-ups to make truthful claims for the products being advertised. *Carter Products, Inc.*, F.T.C. Docket 7943 (order entered December 6, 1963).

Thus, the Commission is seeking to raise in this Court a newly devised theory of violation of the Federal Trade Commission Act that not only has been rejected by two courts of appeals and approved by none, but also was thereafter abandoned by the Commission with respect to advertisements for a shaving cream that is in active competition with Rapid Shave.

## II.

### THE COMMISSION FLOUTED THE DECISION AND MANDATE OF THE COURT OF APPEALS

A preliminary issue on this Petition is whether the patent refusal of the Commission to follow the decision and mandate of the Court of Appeals ought to be countenanced. The Commission did not petition for a writ of certiorari to review the first decision of the Court of Appeals, in which, as has been seen, that Court announced its disagreement with the Commission on the substantive issue of the lawfulness of using mock-ups in television advertisements to make truthful claims for the advertised product. Instead, the Commission undertook to enter a new, reformulated order and to



restate its legal position in two more opinions to accomplish essentially the same objective—a prohibition against the use of mock-ups to make truthful claims for the advertised product. The basic substantive legal premise of the second order, as of the first, was that the use of a mock-up is illegal even when all claims made for the advertised product are absolutely true.

On the appeal from this second order, the question necessarily arose whether the Commission had obeyed the earlier decision and mandate of the Court of Appeals. It is basic to the effective administration of justice that inferior tribunals in the federal judicial hierarchy obey the decisions of the courts empowered to review their judgments. This fundamental principle is true for state courts whose decisions on certain issues are subject to review by the Supreme Court. *E.g., Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816). It is true for lower federal courts. *E.g., United States v. Haley*, 371 U.S. 18 (1962). It is also true for administrative agencies, whether the controlling rule of law was announced by the appellate court in a different case, *e.g., The Stacey Mfg. Co. v. Commissioner*, 237 F.2d 605 (6th Cir. 1956), or, as here, in the very same case. *E.g., Morand Bros. Bev. Co. v. N.L.R.B.*, 204 F.2d 529 (7th Cir.), *cert. denied*, 346 U.S. 909 (1953).

This basic principle has been given specific statutory statement in the Federal Trade Commission Act. Section 5(i) of that statute provides in pertinent part that, after a court of appeals has set aside a Commission order, and following the expiration of the period for filing a petition for a writ of certiorari,

“then the order of the Commission *rendered in accordance with the mandate* of the court of appeals

shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that *it will accord with the mandate*, in which event the order of the Commission shall become final when so corrected." 15 U.S.C. § 45(i) (emphasis added).\*

The weakness of the Commission position—that the Act prohibits the use of mock-ups in making completely truthful claims—is undoubtedly reflected in the procedural morass it has thus created. The Commission's failure to petition for certiorari from the first explicit Court of Appeals decision on that issue and its presentation of the same issue in the present Petition confuses what will be in issue before this Court.

A grant of certiorari in this case would bring before this Court for review not only the question of substantive law belatedly asserted in the Petition, but also initially the question whether the Commission's second order was in accordance with the Court of Appeals' first opinion. Respondent would assert as an independent ground for sustaining the First Circuit's judgment that the Commission had plainly disobeyed that Court's prior mandate. Thus, the substantive issue asserted in the Petition could then be considered only if this Court were first to resolve the mandate point in the Commission's favor. Such a holding, it is submitted, would be unwarranted.

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\*Section 5(h), governing the case where this Court modifies or sets aside an order of the Commission, similarly specifically provides that the new order of the Commission shall be rendered in accordance with the mandate of this Court.

## III.

THE CEASE AND DESIST ORDER OF THE COMMISSION IS  
AMBIGUOUS AND CANNOT BE GIVEN PRACTICABLE  
APPLICATION

It is not the task of this Court to parse, clarify, and elucidate the meaning of an administrative order which the reviewing Court of Appeals has held ambiguous and impracticable of enforcement. Although the Commission seeks review of the question of the lawfulness under the Federal Trade Commission Act of using mock-ups in television advertisements that make truthful product claims, that issue can arise only in the context of a particular cease and desist order. But, as the order involved in this case is impossibly vague, this is not an appropriate case in which to resolve the substantive issue.

The ambiguity in this second order, centering around the phrase "test, experiment, or demonstration," is of two types. First, there is the question of how to parse the words in the order. The Court of Appeals, finding no clear answers either in the language of the order or in the two accompanying Commission opinions, at the oral argument found it necessary to ask Commission counsel for clarification and was told that the word "demonstration" had to be read according to the rule of *ejusdem generis* and really meant a demonstration "in the nature of a test or experiment" (326 F.2d at 520, Pet. App. 23). The fact that Commission counsel had been specifically authorized by the Commission to make this abstruse construction of the order (326 F.2d at 519 n.4, Pet. App. 21 n.4) plainly indicates that even after two tries at framing a precise order, the Commission knew that it had been unsuc-

cessful. Moreover, the Court of Appeals was never sure whether this was the same order it had reviewed earlier, but differently worded, or a different order altogether (326 F.2d at 519 n.5, Pet. App. 22 n.5).

Secondly, even after the grammar of the order is possibly fixed by the Commission's *ex post facto* rule of construction, there remains the more basic question of what the order means, and this question leads into the further question of whether the order can be practicably applied and administered. In other words, does the order, when applied to the many fact situations that will arise, clearly and unambiguously distinguish what it prohibits from what it does not? The Court of Appeals thought that this order did not and said so:

"In spite of the Commission's belief that it has resolved all ambiguities, we envisage great difficulty in determining any dividing line between what is and what is not a test or experiment, or in defining what is a demonstration in the nature of such. Primarily this may be because we find no substantial logical difference between what the Commission disapproves of and what it accepts" (326 F.2d at 521, Pet. App. 24).

An attempt to distinguish the prohibited uses of mock-ups from the permitted uses receives no help from the Commission's explanatory opinions. For example, in its second opinion, the Commission asserted that colored water could be used in the place of Lip-som's iced tea so long as "the appearance of the liquid is merely an incidental aspect of the commercial, is not presented as proof of the fine color or appearance of the tea, and thus in no practical sense would have a material effect in inducing sales of the product" (R.

55). On the basis of this exegesis of the order, one would expect it to prohibit showing a glass of Lipsom's iced tea which is really colored water in the hand of actor who says, "That dark color means a more tea-like taste." But the Commission's brief in the Court of Appeals on the second appeal asserted that the order drew a distinction "between a mock-up which 'displays or illustrates a claim' [which is not prohibited by the order], and one that purportedly 'objectively' 'proves its truthfulness'" (326 F.2d at 520 n.6, Pet. App. 22 n.6). Under this distinction, the hypothetical advertisement may not violate the order, because the visual presentation of a quality in the Lipsom's iced tea advertisement is not of the same order of "objectivity" as is associated with a more scientific test or experiment.

The Court of Appeals aptly illustrated the ambiguity in applying the order in its example of the bed sheets (326 F.2d at 521, Pet. App. 24-25). The Court asked whether it would violate the order in advertising the cleaning power of a laundry soap to show a bed sheet which appears to the viewer to be white but in fact is blue. If such a demonstration is within the second order, it is difficult to see how the reformulated order is any different from the first order. If this demonstration is not within the prohibition of the second order, the question would then arise—and the Court pertinaciously asked it—whether the order would apply if the commercial showed the sheet being removed from a washing machine. Is this a test or experiment? Or to carry the illustration one step further, would the order apply if the viewer saw the sheet, in a soiled condition, placed in the machine and later removed sparkling clean and white?

The ambiguities in the Commission's order are multifarious. They remain despite extensive labors—in the form of two orders, three opinions, and two oral arguments—to eliminate them. The persistence of these ambiguities abundantly confirms that the underlying substantive principle on which the Commission order is sought to be based is without merit.

In addition, these ambiguities furnish an additional ground for upholding the Court below. In deprecating the need for clarity in its Petition for Certiorari (Pet. 15), the Commission not only ignores its own prior emphasis on "the imperative need for explicitness in administrative adjudication" (R. 51), but more importantly forgets this Court's warning in *FTC v. Henry Broch & Co.*, 368 U.S. 360 (1962):

"The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application." *Id.* at 367-68.

The instant order falls conspicuously short of this standard. Not only was the Court below correct in its interpretation of the Act, but it was also correct under *Broch* in remanding the order.

#### IV.

#### THE COURT OF APPEALS CORRECTLY INTERPRETED THE ACT

The basic reason offered by the Commission in support of its Petition is that the lower Court incorrectly interpreted the statute, both in its original holding and in its reaffirmation of that holding on the second



appeal, in deciding that where an advertisement makes a wholly true claim for a product, the fact that a mock-up is used in communicating that true claim to the television audience does not render the advertisement illegal. To buttress its position on this legal question, the Commission suggests that this determination is confided by the statute to its "discretion," and then offers a series of conjectures, having no factual basis of record, as justifications for its position.

The crucial difficulty with this position (which the Court below and the Fifth Circuit have rejected, and which no court has accepted) is that it completely overlooks the legal requirement that an actionable misrepresentation must be material. The basic theory of law presented by the Petition does not involve the appropriateness of a particular remedy, but whether under the Act an advertisement that makes no false claim is illegal. As the Court below held in its first opinion:

"...we are unable to see how a viewer is misled in any material particular if the only untruth is one the sole purpose of which is to compensate for deficiencies in the photographic process. The Commission has put the shoe on the wrong foot. What the viewers are interested in, and moved by, is what they see, not by the means" (310 F.2d at 93, Bates App. 7a).

In holding that the use of mock-ups to communicate a truthful product claim is deceptive, the Commission is confusing *how* a message is communicated to a television viewer with *what* it says to that viewer. The principle stated by the Court of Appeals on the first appeal—that where the claim for a product is *true*, the Commission cannot under the Act prohibit the use

of a mock-up or prop in a video portrayal, or in a test, experiment, or demonstration, making that true claim—is plainly a correct principle of law.

As collateral support for its position, the Commission insists, as it did in its several opinions, that the undisclosed use of mock-ups in television advertising is a “deceptive trade practice under established standards” (Pet. 9). But no Commission decision prior to this one (see page 11, *supra*) nor any decision of any court supports the Commission’s prohibition against a means of communicating an entirely truthful claim. The Commission is, of course, correct when it states that under prior decisions an advertiser may not misrepresent either “the objective characteristics of the advertised product” or “some extrinsic factor” relating to the product (Pet. 10). But an advertisement that employs a mock-up to make a truthful product claim does not make any such misrepresentation.\*

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\* The Commission’s example (Pet. 10), suggested by Niresk. Industries, Inc. v. FTC, 278 F.2d 337, 341-42 (7th Cir.), *cert. denied*, 364 U.S. 882 (1960), where the advertiser represented that its product had been awarded the Good Housekeeping Seal, when in fact the product had not, and with the additional assumption (not in the decision) that the product in fact met the Good Housekeeping Seal standards, is simply a case of a statement of a fact about the product that is not true. There the advertisement represented that the product had been awarded the Good Housekeeping Seal when it had not. Similarly, in *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933), also cited by the Commission as a case in point (Pet. 10), the use of the name “Royal Milling Company” implied a fact about the flour being sold that was not true, namely, that the flour had been milled from wheat by the selling company whereas in fact that company merely mixed and blended previously manufactured flour. The same distinction holds for cases such as *FTC v. Standard Education Soc.*, 86 F.2d 692, 697

As the Commission has framed the issue on which it now seeks Supreme Court review (Pet. 2), there is no untrue statement of a fact about a product when a mock-up is used in portraying *a quality the product in fact possesses*. By hypothesis, what the television viewer sees on the television screen is precisely accurate. If, for example, the viewer sees a mock-up of a testing machine measuring the tensile strength of a piece of rope, he is seeing a test that has been already performed and can be performed again. The only role played by the mock-up of the testing equipment is in communicating that accurate claim of performance to the viewer. There is therefore no support in the earlier cases, which turned upon the presence of factually false claims about the advertised product, for the Commission's position here.

Whatever discretion the Act may confer upon the Commission, the statute does not accord it the power to determine that an advertisement that makes no false

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(2d Cir. 1936), *modified*, 302 U.S. 112 (1937), where it was charged that the advertisements represented that certain persons had given testimonials about the product when in fact they had not.

Judge Aldrich, in his first opinion, accurately disposed of this latter type of case as follows:

"We would agree that it is an unfair advertising practice to publish a purported testimonial when none had been received, even if, from the fact that the advertiser's sales were high and constant, it must be obvious that he has many satisfied customers. A more accurate analogy would be if the advertiser did in fact receive a testimonial, but written in ink that would not photograph. Would the advertiser be guilty of deceit if he copied it over and photographed the copy?" (310 F.2d at 94 n.9, Bates App. 8a n.9).

All the other cases cited by the Commission in its Petition are also cases in which the advertisement made a claim for the product that was not true (Pet. 9 n.4).

claim for a product is somehow false advertising. Even were its suppositions logical and consistent (and in two carefully reasoned opinions the lower Court demonstrated that they were not), or its order not ambiguous and impracticable of compliance, administrative "discretion" does not permit interpreting a prohibition against false advertising to proscribe advertisements that make only true claims.\*

In short, all that the Act requires is that the viewer see and hear an advertising message that is true as to the qualities or merits claimed for the product. The way in which that truthful claim is communicated—be it by a test, experiment, diagram, or animated cartoon—is wholly immaterial. The attempt by the Commission to deal with the *means* of communicating truthful product claims by prohibiting the use of mock-ups or props is beyond the Act. The decision of the Court below was plainly right.

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\* One result of the position that the Commission espouses (Pet. 12-17) is that it may be impossible in some instances to advertise effectively a product intrinsically superior to competing products if it is not possible to devise tests of that product's superior qualities that do not require the use of mock-ups for accurate reproduction over television. At the same time, the inferior competing products, whose major advantage is that their qualities (although objectively inferior) can be demonstrated without the use of mock-ups or props, will receive a far broader advertising coverage and make a far greater dramatic impact upon the viewer. Under a rule of illegality that looks only to the *truth* of the claims being made, and not to the *means* of making them, all competing products remain on a par except to the extent that their actual qualities or merits may differ. Compare the lower Court's discussion, 310 F.2d at 93-94, Bates App. 7a-8a.

**CONCLUSION**

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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May, 1964

**APPENDIX A**

**UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

Nos. 5972, 5986.

**COLGATE-PALMOLIVE COMPANY, *Petitioner,***

**v.**

**FEDERAL TRADE COMMISSION, *Respondent.***

**TED BATES & COMPANY, INC., *Petitioner,***

**v.**

**FEDERAL TRADE COMMISSION, *Respondent.***

Decided November 20, 1962

Before WOODBURY, Chief Judge, and HARTIGAN and ALDRICH, Circuit Judges.

ALDRICH, Circuit Judge.

These petitions to review and set aside a cease and desist order of the Federal Trade Commission are noteworthy principally because of the extremes to which the dispute has led the parties. We shall refer to the petitioners as they were below, viz., as respondents. Respondent Colgate-Palmolive Company, with the aid and at the suggestion of its advertising agency, respondent Ted Bates & Company, in 1959 released three substantially similar television commercials (hereinafter referred to in the singular) to advertise the "moisturizing" qualities of Colgate's pressurized<sup>1</sup> shaving preparation Palmolive Rapid Shave, hereinafter the cream. The commercial was a dramatic "audio" and "video" exposition in which sandpaper was apparently shaved with a safety razor with a single stroke immediately following the application of the cream. This demonstration, it was vocally claimed, "proved" the moisturiz-

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<sup>1</sup> See *Carter Products, Inc. v. Colgate-Palmolive Co.*, 4 Cir., 1959, 269 F.2d 299.



ing qualities of the cream and that it would have the same effect "for you." In fact the demonstration did not employ sandpaper at all, but a simulated mock-up of sand on plexiglass. The Commission brought a civil complaint against respondents, charging misrepresentations in that " . . . said visual demonstration was a 'mock-up' . . . [and] does not prove the 'moisturizing' properties of Palmolive Rapid Shave, in actual use, for shaving purposes." Respondents' answers admitted that the demonstration was a mock-up, but asserted that the "commercials contained a fair and true illustration of the otherwise proven fact that Palmolive Rapid Shave has excellent wetting qualities." Following a trial the Commission issued a broad order against both respondents of which they now seek review.

Respondents' first defense is that the cream did in fact permit the shaving of sandpaper as apparently shown, so that there was no misrepresentation. This claim is conspicuously lacking in merit. Ordinary coarse sandpaper can be shaved, but not until the cream has remained upon it for upwards of an hour. Even if we could assume that a particularly fine grade of paper, described as "finishing paper," could fall within the common understanding of what the audio portion described as "tough"<sup>2</sup> sandpaper, which we may doubt, and even if the visual demonstration, which was clearly of a coarse<sup>3</sup> brand of sandpaper, did not

<sup>2</sup> Respondents object to the Commission's reference to the adjective "tough" because it was not specifically mentioned in the complaint, and elsewhere make other, similar, objections. There was no dispute as to what was in the commercial. We can not think the complaint had to set forth every word.

<sup>3</sup> Counsel for respondents claim that the purported sandpaper looked coarser on the movie exhibit introduced in evidence by the Commission than it appeared to the television viewers. Apart from the absence of evidentiary support for this contention, it is pointless in the light of the candid testimony of one of Bates' employees that the commercial's sandpaper appeared coarser than the finishing paper on which respondents rely.

conclusively foreclose that assertion in this case, which we doubt even more, respondents are not aided: Their best evidence was that even finishing paper required that the cream rest upon it for one to three minutes before shaving was possible. The video portion of the demonstration shows no such inconvenient wait, but graphically exhibits no pause or break between the application of the cream to the paper, the reaching for the razor, and the shaving operation. It is true that the accompanying audio portion of the commercial uses the word "soak." Respondents contend that soaking means an appreciable passage of time. The Commission was well warranted in finding that the word "soak" was so unobtrusive that many viewers might not notice it, and that even those who did might conclude that the length of the announced soaking was not one to three minutes or more, but the insignificant interval defined by the visual portrayal, the same as was shown for "soaking" the human beard.<sup>4</sup> It should be obvious by now to anyone that advertisements are not judged by scholarly dissection in a college classroom. *F. T. C. v. Standard Education Society*, 1937, 302 U.S. 112, 116, 58 S.Ct. 113, 82 L.Ed. 141; *Aronberg v. F. T. C.*, 7 Cir., 1942, 132 F.2d 165.

Respondents next contend that the length of time required to shave sandpaper was not within the pleadings. We agree with them that the Commission did not happily phrase its order denying a motion to amend the complaint. Although respondents predicate some argument on this denial, which the Commission might well have anticipated, one may nevertheless question how seriously they were misled into thinking the issue was simply whether sandpaper of a variety not depicted could eventually be shaved.

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<sup>4</sup> Respondents do not make the contrary suggestion that beards, too, must be soaked for one to three minutes. Indeed, they could not, without making the picture a serious misrepresentation in another respect.

when the complaint plainly charged that the "commercial, which include a visual demonstration \* \* \* represented, directly or by implication, that \* \* \* it is possible to forthwith shave off the rough surface of said sandpaper \* \* \* ." More important, respondents have not been able to suggest to us how, in the light of the evidence which they introduced after a suitable interval to prepare against the Commission's showing, they have been prejudiced. Rather, we think they are simply trying to restrict the issue to one they might be able to meet, instead of one they plainly cannot. The Commission rejected this attempt, and we agree.

Next, respondents assert that the commercial, even if not true with respect to sandpaper, was mere metaphorical puffing; that there is no contention that the cream did not possess entirely adequate moisturizing properties for shaving humans (the Commission makes no claim of inadequacy of the cream); that no one bought the cream intending to shave sandpaper, and that therefore there was no misrepresentation as to any material matter. Within limits we are sympathetic with the principle allegedly underlying respondents' contention. Graphic visual demonstrations that have dramatic appeal may well be mere puffing. References to sandpaper beards may of themselves be harmless, and so may be pictures illustrating the analogy. We see no objection to obvious fancy, provided there is no underlying misrepresentation. But respondents' difficulty is that they do not come under any such principle. They went far beyond generalities and eye-catching devices into asserting as a fact that the cream enables sandpaper to be shaved forthwith, and that this fact "proved" the cream's properties for shaving humans. They cannot now suggest that ability to shave sandpaper forthwith was an irrelevant fact and an irrelevant representation.<sup>5</sup> We agree with the

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<sup>5</sup> The Commission makes an interesting counter-suggestion. If shaving sandpaper did *not* prove something about shaving humans, was there not a still further misrepresentation?

Commission that it is immaterial that the cream may in fact have adequate shaving qualities. If a misrepresentation is calculated to affect a buyer's judgment it does not make it a fair business practice to say the judgment was capricious. *Mohawk Refining Corp. v. F. T. C.*, 3 Cir., 1959; 263 F.2d 818, cert. den, 361 U.S. 814, 80 S.Ct. 53, 4 L.Ed.2d 61; *C. Howard Hunt Pen Co. v. F. T. C.*, 3 Cir., 1952, 197 F.2d 273.

It may well be that little injury was done to the public by respondents' representations. We suggested in our opening sentence that we consider this a rather trivial case. Nonetheless, we could not possibly say that it was not within the province of the Commission to conclude that such conduct should be forbidden. Colgate's motion to dismiss the complaint was properly denied.

Respondent Bates contends that as a mere advertising agency no order should be entered against it in any event. On one occasion the Commission has drawn such a distinction on the ground that the agency was but a secondary actor. This ruling, however, was expressly stated to be a matter of "sound discretion." *Bristol-Myers Co. et al.*, 1949, 46 F.T.C. 162, 176. Where, as here, the Commission was warranted in finding that the advertising agency was an active, if not the prime, mover, we could not say that the Commission lacked either jurisdiction or discretion. Cf. *C. Howard Hunt Pen Co. v. F. T. C.*, supra 197 F.2d at 281; *Chas. A. Brewer & Sons v. F. T. C.*, 6 Cir., 1946, 158 F.2d 74; see also *National Cash-Register Co. v. Leland*, 1 Cir., 1899, 94 F. 502, 507, cert. den. 175 U.S. 724, 20 S.Ct. 1021, 44 L.Ed. 337.

Very different questions, however, arise when we come to the scope of the order. The interdiction of which respondents principally complain prohibits the following:

"Representing, directly or by implication, in describing, explaining, or purporting to prove the quality or

merits of any product, that pictures, depictions, or demonstrations, either alone or accompanied by oral or written statements, are genuine or accurate representations, depictions, or demonstrations of, or prove the quality or merits of, any product, when such pictures, depictions, or demonstrations are not in fact genuine or accurate representations, depictions, or demonstrations of, or do not prove the quality or merits of, any such product."

Analysis of this portion of the order shows it to be quite ambiguous. On first reading we had thought that, in effect, it simply forbade demonstrations which represented a product as doing something that it could not do, or as appearing to have qualities which it did not possess. There could be no objections to such an order except respondents' special objection that this particular one embraces too many products. But respondents say that the language goes far beyond such conduct, and would prohibit any demonstration even if it did not misstate facts about, or misrepresent the appearance of, the product, if it was not "genuine" in that the actual substance used in the studio, because of technical problems of photography, was not the product itself. In other words, it would be no defense that, as the examiner found on undisputed testimony here, the shaving of sandpaper, even when in fact accomplished, does not properly reproduce on television and must be simulated to be effective. Similarly, it appears that coffee, orange juice and iced tea lose their true colors, so that artificial substances have to be substituted to make them look natural, while in another area products such as ice cream and the "head" on beer melt under the hot camera lights and require the use of more stable substitutes. On consideration we agree with respondents that the order may be read as forbidding such conduct. Furthermore, we believe that

this was the Commission's intention.<sup>6</sup> In its opinion accompanying the order the Commission stated that one of the issues was whether, even if the cream permitted the shaving of sandpaper precisely as pictured, there was "nonetheless a misrepresentation \* \* \* and an unfair advertising practice." The Commission resolved this issue by concluding that it was "an illegal practice," and was likely to deceive the public and cause purchasers to buy what otherwise they would not have bought.<sup>7</sup>

We, of course, agree with the Commission that there is a misrepresentation, of a sort, in any substitution case. But we are unable to see how a viewer is misled in any material particular if the only untruth is one the sole purpose of which is to compensate for deficiencies in the photographic process. The Commission has put the shoe on the wrong foot. What the viewers are interested in, and moved by, is what they see, not by the means. We suggested to counsel that this could be readily tested. Suppose, in the case of color television, a milk producer wishes to advertise the rich quality of his cream. Obviously

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<sup>6</sup> Indeed, the Commission seemed eager to raise this question. For example: "Thus, while the particular facts of this case may seem trivial, it raises the broad question whether mock-ups or simulated props may lawfully be used in television commercials to demonstrate qualities claimed for products, where the audience is told that it is seeing one thing being demonstrated while actually it is seeing something different."

<sup>7</sup> To be doubly sure our understanding of the Commission's position was correct, we put the following case to its counsel. Suppose a prominent person is photographed saying, "I love Lipsom's iced tea," while, apparently, he drinks a glass of iced tea. In truth the individual does like Lipsom's tea, and frequently drinks it, but for the above-mentioned technical reasons is then drinking colored water. What the viewer sees on the screen looks exactly as Lipsom's iced tea does in fact look. Asked if this would be misconduct, counsel replied that it was the Commission's position that it would be, because the viewer has been led to believe he is seeing iced tea when in fact he is not.



he cannot use a foreign substance so that his product will appear yellower and richer than it is. But, equally, should he be allowed to use his own cream if he knows that by the normal photographic process its color would be changed so as to appear substantially better on the screen than it was? We suspect the Commission would think it clear he could not. Yet if he used an artificial substance in order to produce the exactly correct appearance, under the Commission's rule there would be deceit. Counsel gave no answer. We are not critical of counsel, because we think his client has left him without one.<sup>8</sup>

The Commission has confused two entirely different situations. Of course, as we have already said, if a purported demonstration attributes to a product qualities it does not in fact possess, the advertiser will not be permitted to say that the product can still do all it needs to do, or is "just as good" even though it does not have the claimed characteristic. The Commission properly said that the customer is entitled to get what he is led to believe he will get, whether he is right or wrong in thinking it makes a difference.<sup>9</sup> But where the only untruth is that the

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<sup>8</sup> We realize that counsel might have replied that products which do not photograph accurately should never be represented. This would seem—at least to those who use television commercials—a drastic remedy. We believe the burden should be on the Commission to demonstrate an equivalent need.

<sup>9</sup> The Commission also relied on what it called "phony" testimonial cases. *F. T. C. v. Standard Education Society*, supra, 302 U.S. at 118, 58 S. Ct. at 116; *Niresk Industries, Inc. v. F. T. C.*, 7 Cir., 1960, 278 F.2d 337, cert. den. 364 U.S. 883, 81 S.Ct. 173, 5 L.Ed. 2d 104. We would agree that it is an unfair advertising practice to publish a purported testimonial when none had been received, even if, from the fact that the advertiser's sales were high and constant, it must be obvious that he has many satisfied customers. A more accurate analogy would be if the advertiser did in fact receive a testimonial, but written in ink that would not photograph. Would the advertiser be guilty of deceit if he

substance he sees on the screen is artificial, and the visual appearance is otherwise a correct and accurate representation of the product itself, he is not injured. The viewer is not buying the particular substance he sees in the studio; he is buying the product. By hypothesis, when he receives the product it will be exactly as he understood it would be. There has been no material deceit.

The present order must be set aside. We do not, of course, suggest that it was erroneous in every particular, but the Commission's fundamental error so permeates the order that we think it best that an entirely new one be prepared. We also think it best that the Commission be the one to do so. We will make, however, two suggestions. The Commission has directed this part of its order to every kind of product that Colgate may hereafter advertise, and, in the case of Bates, with regard to every customer. If mock-ups, or what the Commission chooses to call demonstrations that are not "genuine," were illegal per se, then it might be appropriate, although we need not decide, to enter a broad order forbidding all such demonstrations en masse. We have undercut the basis for any such order. Under our construction there is no showing of any "method" or "practice" in the sense discussed by the Commission in its opinion. Respondents' only offense was the making of a single misrepresentation about a single product. The fact that this was accomplished by a "demonstration" did not warrant a broad order against all future misrepresentations of any kind by demonstrations any more than the fact that a misrepresentation was made in print would justify an order against all future

copied it over and photographed the copy? If an endorser may not be shown enjoying colored water that looks like, but is not, iced tea, then, seemingly, it would not be "genuine" to photograph a copy of a testimonial leading viewers to believe it was an original document. It is difficult to think the Commission fully appreciated the principle it has espoused.

misrepresentations of any kind by printing. The Commission has revealed that it is well aware of the scope to be applied to single misrepresentations, and we need say no more on this subject. See e. g., Colgate-Palmolive Co., Docket No. 7660, March 9, 1961, Trade Reg. Rep., (1960-61 Transfer Binder) ¶ 29445.

Secondly, with respect to the respondent Bates, we think there may well be a distinction between a principal and an agent in the permissible scope of an order. In some degree a principal may well be held to advertise at his peril. But we have reservations as to how far it is appropriate to go in the case of an agent, in the absence, at least, of any suspicion on its part that the advertisement is false. Cf. Bristol-Myers Co., supra.

Judgment will be entered setting aside the order of the Commission. Further proceedings to be in accordance with this opinion.

**APPENDIX B**

**UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

**No. 5972**

**COLGATE-PALMOLIVE COMPANY, *Petitioner,***

**v.**

**FEDERAL TRADE COMMISSION, *Respondent.***

**No. 5986**

**TED BATES & COMPANY, INC., *Petitioner,***

**v.**

**FEDERAL TRADE COMMISSION, *Respondent.***

**DECREE**

**November 20, 1962**

This cause came on to be heard on petitions for review of an order of the Federal Trade Commission, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the Federal Trade Commission is set aside. Further proceedings are to be in accordance with the opinion filed this day.

By the Court:

**ROGER A. STINCHFIELD, *Clerk.***

By: /s/ **DANA H. GALLUP,**  
***Chief Deputy Clerk.***

A true copy:

**Attest: ROGER A. STINCHFIELD, *Clerk.***

By: **DANA H. GALLUP,**  
***Chief Deputy Clerk.***

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# In the Supreme Court of the United States

OCTOBER TERM, 1964

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No. 62

FEDERAL TRADE COMMISSION, PETITIONER

v.

COLGATE-PALMOLIVE COMPANY AND  
TED BATES & COMPANY, INC.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT

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BRIEF FOR THE FEDERAL TRADE COMMISSION

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## OPINIONS BELOW

The first opinion of the court of appeals (R. 34-43) is reported at 310 F. 2d 89. The second opinion of the court of appeals (R. 130-140) is reported at 326 F. 2d 517. The first opinion of the Federal Trade Commission (R. 9-32) is reported at 59 F.T.C. 1452. The second and third opinions of the Commission (R. 47-60, 96-98) are not yet reported.

## JURISDICTION

The judgment of the court of appeals (R. 140) was entered on December 17, 1963. On March 19, 1964, Mr. Justice Goldberg extended the time for filing a petition for a writ of certiorari to and including

April 15, 1964. The petition was filed on April 15, 1964, and granted on May 25, 1964 (R. 142; 377 U.S. 942). The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

#### **QUESTION PRESENTED**

Whether the Federal Trade Commission may prohibit, as an unfair or deceptive trade practice, the representation that a test, experiment, or similar demonstration shown on television provides the viewer with visual proof of a product claim when the observed test is in truth a sham because of the undisclosed use of substitutes.

#### **STATUTE INVOLVED**

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S.C. 45, provides in part as follows:

(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

\* \* \* \*

(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations \* \* \* from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

#### **STATEMENT**

The Commission's complaint charged respondents (an advertiser and its advertising agency) with having committed false and deceptive acts and practices, in violation of Section 5 of the Federal Trade Com-

mission Act, in connection with three 60-second television commercials for Rapid Shave shaving cream, which were widely broadcast on a national network in 1959 (R. 9). The advertisements are set forth in detail in the Commission's first opinion (R. 9-11). They were summarized by the court of appeals as follows (R. 35):

The commercial was a dramatic "audio" and "video" exposition in which sandpaper was apparently shaved with a safety razor with a single stroke immediately following the application of the cream. This demonstration, it was vocally claimed, "proved" the moisturizing qualities of the cream and that it would have the same effect "for you." In fact the demonstration did not employ sandpaper at all, but a simulated mock-up of sand on plexiglass.

On appeal from the hearing examiner's initial decision dismissing the complaint, the Commission, in an opinion by Commissioner Elman, concluded (1) that Rapid Shave could not shave sandpaper under the conditions depicted in the demonstration, and that respondents had therefore misrepresented the product's moisturizing qualities (R. 14-18); and (2) that, quite apart from that misrepresentation, the representation that a bona fide experimental proof was being shown (when the experiment was in fact rigged by the use of a plexiglass substitute) was itself both false and material and was therefore unlawful. "The point is that the 'proof' offered was a material element of the advertising; without it, the advertising might not have succeeded in selling the product; and, in fact, the 'proof' was not proof at all" (R. 21). Accord-

ingly, the Commission entered an order both (1) forbidding respondents to misrepresent the quality or merits of Rapid Shave or any other shaving cream, and (2) forbidding them, "in describing, explaining, or purporting to prove the quality or merits of any product," to misrepresent "that pictures, depictions, or demonstrations \* \* \* are genuine or accurate representations \* \* \* of, or prove the quality or merits of" the product (R. 7-8).

On review, the Court of Appeals for the First Circuit, in an opinion by Judge Aldrich, set aside the Commission's order (R. 34-43). While fully sustaining the Commission's conclusion that respondents had misrepresented the qualities of Rapid Shave (R. 35-38), the court held that the Commission's order forbidding the undisclosed use of mock-ups in television commercials was too broad. It remanded the case for the Commission to draw a new order.

On remand, the Commission undertook to reconsider the entire case and to formulate a new order responsive to the questions raised by the court of appeals. In its opinion on remand, the Commission restated its theory underlying the "demonstration" aspect of the case (R. 49):

Respondents, in their television commercials for Rapid Shave, were not content merely to claim that its "super-moisturizing power" was so great that it could shave sandpaper. Had the commercials been limited to that claim, the case would have raised only the narrow factual issue of its truthfulness. Respondents saw fit to go much further and to "prove" the claim by "demonstrating" this purported quality of

the product to the viewing public. Respondents were evidently aware that many viewers might not be willing to take their word for it that Rapid Shave could shave sandpaper. For those skeptical viewers, additional proof of the truthfulness of the claim was apparently thought necessary in order to sell the product. Respondents sought to exploit the popular belief that "the camera doesn't lie." By means of the "sandpaper test" demonstration, respondents in effect stated to the viewing public: "Do you doubt that Rapid Shave really can shave sandpaper, and suspect that we may be exaggerating its merits? Well, see for yourselves, and your doubts will disappear. Here is a piece of tough, dry sandpaper. Look at how quickly and cleanly Rapid Shave shaves it. And Rapid Shave can do the same for you, even if your beard is as tough as sandpaper."

The Commission also explained that it was not forbidding the use of all mock-ups in television advertising (R. 51):

The Commission did not have before it any abstract question whether the use of mock-ups in television advertising is, in all circumstances, *per se* illegal; or whether, in a casual or incidental display of a product that cannot be faithfully reproduced on the television screen because of technical deficiencies in the photographic process, it is permissible to use substitute materials to overcome those deficiencies. Rather, a distinction was sought to be drawn between mock-ups that are used in demonstrations designed to prove visually a quality claimed for a product and are thus material to

the selling power of the commercial, and those that are not. We entirely agree with the Court of Appeals, for example, that there is nothing objectionable in showing a person drinking what appears to be iced tea, but for technical photographic reasons is actually colored water, and saying "I love Lipsom's tea", assuming the appearance of the liquid is merely an incidental aspect of the commercial, is not presented as proof of the fine color or appearance of the tea, and thus in no practical sense would have a material effect in inducing sales of the product.

The final order entered by the Commission on remand (after the Commission in a third opinion again reexamined the scope and application of the order, R. 96-98) ordered the respondents to cease and desist from (R. 93-94):

Unfairly or deceptively advertising any such product by presenting a test, experiment or demonstration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sales, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop instead of the product, article, or substance represented to be used therein.<sup>1</sup>

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<sup>1</sup> The order affords respondent Ted Bates & Company, the advertising agency, a defense in the situation where it neither knows nor has reason to know that a mock-up was used in the test (R. 94). The order also forbids misrepresentations of product quality or merits. This latter part of the order was sustained by the court below and is therefore not in issue before this Court.



Respondents again sought review of the order, contending primarily that the Commission had not complied with the court's earlier mandate. The court did not accept or reject either this contention or the Commission's contrary arguments.<sup>2</sup> Because of the importance of the substantive issue, the court declined to review the Commission's last order "from the limited standpoint of whether it comports with our previous opinion." Instead, it expressly undertook to reexamine the Commission's position "on the merits" (R. 133)..

The court again set aside the order, remanding the case with directions to "enter an order confined to the facts of this case, where respondents used a mock-up to demonstrate something which in fact could not be accomplished" (R. 139). Noting that the use of mock-ups or substitutes is at times necessary to compensate for the limitations of television and that the Commission did not object to this use in contexts where there is no representation that experimental proof is being furnished, the court found "great difficulty in determining any dividing line between what is and what is not a test or experiment" (R. 135). In light of this and the slight harm it felt resulted where, although the purchaser is deceived in believing he is seeing an experimental proof, the product he "buys can do and has done exactly what he thinks he sees it do" (R. 136), the court held that there was "only one practical solution." That was to permit representations that "experimental proof" is being furnished wherever the

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<sup>2</sup> See, in particular, the Commission's third opinion which dealt with this question (R. 96-98)..

sponsor neither falsifies the qualities of the advertised product nor states expressly that the experiment or test is being performed without the use of mock-ups (R. 138).

#### INTRODUCTION AND SUMMARY OF ARGUMENT

As a result of the extended proceedings in this case, the issues have been narrowed to one: Whether under Section 5 of the Federal Trade Commission Act the Commission is authorized to prevent the use on television of advertising demonstrations that purport to furnish visual experimental proof of a product's quality or merits but in fact prove nothing because of the undisclosed substitution of a mock-up or other sham product. We believe that the resolution of this issue involves no more than the application of settled principles of the law of deceptive practices to the new advertising techniques which television has developed to take advantage of its capabilities as a "live" medium. To the extent that respondents misrepresented the qualities of their product—i.e., the claim that Rapid-Shave will shave sandpaper when in fact it will not—the case involved only the application of those principles to a traditional misrepresentation. The additional problem created by television advertising is the danger of a different kind of misrepresentation—not merely a false claim as to a product's capabilities, but the further false claim that these capabilities are being proven to the viewer by a test which the viewer is watching.

Under established rules this misrepresentation, too, is plainly an unfair or deceptive trade practice: (1)

it involves a deliberately false representation; and (2) the representation is material in the sense that it furnishes an important inducement to the buyer. Indeed, as the Commission pointed out, the very purpose of purporting to furnish experimental proof, rather than merely stating the sponsor's claims, is to convince skeptical television viewers that they have something more than the sponsor's say-so on which to base their purchasing decisions. The fact that a seller's factual representations are false and material in the sense of being calculated to induce sales has always been deemed sufficient to make applicable the statute's prohibitions of unfair and deceptive trade practices. No further showing of injury to either the public or competing sellers is required. Purchasers are entitled to be protected against being tricked into making a purchase, whether or not the false inducement results in the buyer's receiving a product with which he would be dissatisfied or paying more for it. *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112. Honest competitors cannot be put to the choice of offering false inducements or losing sales, for the "Commission was not organized to drag the standards [of fair dealing] down." *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 79.

Finally, even if it were necessary to look beyond the general statutory prohibition of all material misrepresentations, the Commission's action in this case was plainly authorized and warranted. The Commission properly concluded that the substantial public harm resulting from false representations that experimen-

tal proof is being furnished television viewers outweighs any possible "benefits" resulting from these misrepresentations. Its order is clear and does not interfere with the right of sponsors to use mock-ups to compensate for the limitations of television in portraying the qualities or uses of their products, so long as they do not add an additional representation that their claims can be confirmed and verified by watching a televised test or experiment which is in fact rigged by the undisclosed substitution of mock-ups. The Commission's order should therefore have been sustained by the court of appeals.

#### ARGUMENT

### I

RESPONDENTS' REPRESENTATION THAT THE TELEVISED "SANDPAPER TEST" WAS A BONA FIDE EXPERIMENT FURNISHING VISUAL PROOF OF A QUALITY OF RAPID SHAVE WAS FALSE AND A MATERIAL INDUCEMENT TO PURCHASERS; IT WAS THEREFORE AN UNFAIR OR DECEPTIVE TRADE PRACTICE

#### A. THE REPRESENTATION WAS FALSE AND MATERIAL

The only facts necessary to establish an unfair or deceptive trade practice have been found by the Commission: the use of factual representations that were false and would furnish material inducements to purchasers. None of the Commission's findings has been overturned by the court below.

First, respondents represented that they were actually showing television viewers an experimental test (the "sandpaper test") to prove that Rapid Shave is as "moisturizing" as claimed. Viewers were in-

tentially led to believe that they were seeing visual proof of the respondents' claims in the form of a test involving the application of shaving cream to sandpaper and the shaving of sandpaper. The respondents have never challenged the Commission's finding that this was the content of their representations on television, and the court below accepted this finding (R. 35).

Second, the representation was concededly false. Respondents were not showing an actual test or proof of the capacity of Rapid Shave. What was represented as a test was rigged by the use of a plexiglass substitute for sandpaper and thus could prove nothing as to the claimed effects of Rapid Shave on sandpaper.

Third, the Commission found that the sham "sandpaper test" was intended and calculated to convince otherwise skeptical viewers of the merits of Rapid Shave and to persuade them to buy the product—i.e., it was intended to furnish a material inducement to purchasers. That finding has never been questioned and indeed could not be. The very purpose of the "sandpaper test" was to hold out something beyond the sponsor's say-so as proof of the truth of the sponsor's claims, because, it was felt, this "proof" would influence the purchasing decisions of viewers. As the Commission's first opinion states (R. 21):

[T]he pictorial test of "Rapid Shave," proving to any doubting Thomas in the vast audience that "By golly, it really *can* shave sandpaper!" was the clinching argument made by the commercials. The "sandpaper test" was conducted, as the announcer said, "[t]o prove Rapid

Shave's super-moisturizing power \* \* \*." Without this visible proof of its qualities, some viewers might not have been persuaded to buy the product. At least, respondents must have thought so, or else they would not have emphasized the pictorial "sandpaper test" in the expensive television advertisements of their product. One need only consider the difference in the impact of these commercials on viewers had they been told, honestly and truthfully, that what they were seeing tested was a plexiglass mock-up rather than what they thought and were told they were seeing, namely, actual sandpaper. The difference between telling and not telling the truth could, in this instance at least, have been the difference between an effective and ineffective "sell."

The Commission's findings that respondents intentionally misrepresented facts that they believed, and intended, would influence the purchasing decisions of viewers are, thus, not seriously open to challenge. Respondents have argued that, where such misrepresentations are the means of making a true claim about the product, they are not "material," because the purchaser is not significantly harmed by the deception. He is initially misled, perhaps, but eventually he receives a product which has the qualities he expected. But this is a mere play on the word "material." Respondents' misrepresentations were "material" in the only sense in which this term has been used in the law of unfair or deceptive trade practices: they were intended and calculated to influence purchasers in making their purchasing decisions.



**B. THE FEDERAL TRADE COMMISSION ACT FORBIDS ANY FALSE STATEMENT WHICH IS INTENDED AND CALCULATED TO INFLUENCE AND MISLEAD PURCHASERS**

Section 5 of the Federal Trade Commission Act proscribes, as an unfair and deceptive trade practice, the intentional misrepresentation of *any* fact which would constitute a material factor in a purchaser's decision to buy a product. As a matter of statutory policy, there is no basis for limiting the generality of this rule. The Act is intended to protect the rights of purchasers and honest competitors by requiring compliance with appropriate standards of fair dealing. Purchasers are granted a statutory right to exercise their preferences in a context free of any deception intended or likely to influence their decisions. This simply recognizes an accepted standard of fair dealing: purchasers should not be tricked into buying any product. Honest competitors require the same protection. They cannot fairly be required to choose between losing sales and misrepresenting facts important to a purchaser's decision. "The Commission was not organized to drag the standards [of fair dealing] down." *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 79.

As a matter of precedent, we know of no exceptions to the rule prohibiting misrepresentations intended to influence and deceive buyers in making their purchasing decisions. Indeed, the history of judicial interpretation of the Act can fairly be described as a record of rejection of proposed exceptions based on the alleged harmlessness of deceiving purchasers in particular respects. This Court early rejected the defense that, while the buyer was materially misled as to the precise

qualities of the product, he received a product every bit as good as the one he was led to expect. "[T]he public is entitled to get what it chooses," regardless of the wisdom or folly of the grounds for its preferences. *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 78. Similarly, in a series of cases the courts have rejected defenses based on the fact that the misrepresentations, while material to purchasers, related only to extrinsic factors, not to the qualities of the product itself.<sup>3</sup> For example, a seller cannot appeal to the purchaser's pride by stating falsely that his offer is being made only to a few carefully selected persons, although the buyer will receive the very product he expected and will pay no more for it than he planned to pay. *Federal Trade Commission v. Standard Education Society*, 86 F. 2d 692 (C.A. 2), modified, 302 U.S. 112. And this Court has held that a purchaser is entitled to be protected against being duped into buying an encyclopedia when he thinks he is being given the encyclopedia and sold an accompanying "extension service," even though he receives exactly what he believed he would receive and pays

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<sup>3</sup> See e.g., *L. Heller & Son, Inc. v. Federal Trade Commission*, 191 F. 2d 954<sup>2</sup> (C.A. 7) (failure to disclose country of origin of product); *Federal Trade Commission v. Standard Education Society*, 86 F. 2d 692 (C.A. 2) (dishonest testimonials), modified, 302 U.S. 112; *Mohawk Refining Corp. v. Federal Trade Commission*, 263 F. 2d 818 (C.A. 3) (that product is reprocessed); *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212 (seller's trade status); *Steebo Stainless Steel, Inc. v. Federal Trade Commission*, 187 F. 2d 693 (C.A. 7) (false disparagement of competitors).

exactly what he thought he would pay.\* *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112. Such "extrinsic" but material misrepresentations are condemned for reasons best stated by Judge Learned Hand—they "give a competitive advantage to the less scrupulous seller and \* \* \* they not only add nothing to the buyer's opportunities to buy wisely, but hold out to him false inducements." *Federal Trade Commission v. Standard Education Society*, *supra*, 86 F. 2d at 696.

These principles are dispositive of the present case. One of the factors material to purchasers is the basis they have for believing the truth of a seller's claims. Accepted standards of fair dealing would not permit a seller to state falsely that he was a minister or a judge or a relative of the buyer and could therefore be trusted as to the truth of his claims. Regardless of the truth or falsity of the claims made for the product, such deception in the means of convincing buyers of the truth of the claims is unfair both to purchasers and to honest competitors. Similarly, the Act would prohibit a false representation that the X testing agency had certified the capacity of Rapid Shave to make sandpaper shaveable, regardless of the actual capabilities of the product. A buyer who relied on the representation would be significantly deceived in the exercise of his preferences; a competitor unwill-

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\* Similarly, the Commission can doubtless forbid an appeal to the purchaser's charity or sympathy based on the false representation that a particular seller contributes one-half his earnings to charity (or is impoverished) and should therefore be favored.

ing to resort to significant deception would be unfairly disadvantaged.

Identical reasons condemn a rigged experimental "proof" intended to convince skeptical television viewers of the truth of a sponsor's claims. Buyers should not be tricked into buying a particular product; competitors cannot be required to choose between presenting sham tests as proof of their own claims and losing sales. For these reasons the Commission's power to forbid sham experiments represented as proof of product claims does not depend upon a showing that the underlying product claims are untrue. The dishonesty of this method of convincing purchasers to accept the seller's word, without more, justified the Commission in finding it to be an unfair method of competition.

## II

THE COMMISSION ACTED WITHIN ITS AUTHORITY IN FORBIDDING FALSE REPRESENTATIONS THAT A SPONSOR IS FURNISHING VISUAL, EXPERIMENTAL PROOF OF A PRODUCT CLAIM

We believe that the Federal Trade Commission Act forbids any misrepresentation intended to influence the decisions of purchasers, without any further showing of harm. But, even if the respondents were correct in arguing that not all material misrepresentations are prohibited, the Commission's order in the present case should have been affirmed; for the Commission could and did reasonably conclude that the harm of such misrepresentations as are involved in this case far exceeds any possible benefits or convenience to advertisers from permitting their use.

The court of appeals held that the Commission could not apply the general prohibition of material misrepresentations to sham tests purporting to prove a product claim. It believed that the harms are slight when a sponsor represents that a rigged experiment gives visual proof of the merits of a product, so long as the product in fact has the merits claimed for it. The court considered these harms outweighed by the difficulties of forbidding such misrepresentations without also interfering with a sponsor's occasional need to use substitutes and mock-ups to give an accurate picture of the merits of his product. While we believe that the court's assessment of the balance of harms and needs is demonstrably wrong, the heart of the issue lies elsewhere. If material misrepresentations are ever to be tolerated for reasons such as those given by the court below, it is for the Commission, not the reviewing court, to make this determination, subject only to review for abuse of the agency's discretion. *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643; *Federal Trade Commission v. R. F. Keppel & Bro.*, 291 U.S. 304; *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112. In this case the Commission properly exercised its discretion in declining to approve respondents' misrepresentations.

A. The Commission was amply justified in concluding that the harms of rigged experimental proofs outweigh the need for them. The legitimate needs of sponsors are not affected by the order. When a sponsor does not purport to be furnishing experimental proof to verify his claims about the product,

no material deception may result from the use of substitutes to compensate for photographic deficiencies in the portrayal of his product or its uses. For this reason the Commission's order does not reach the use of substitutes in the great majority of television commercials: those which merely state and portray a product claim. The public will be significantly misled, however, when the sponsor attempts to influence the purchasing decisions of viewers by purporting to furnish visual proof of facts that confirm his claims and add credibility to his otherwise unverified words. The Commission's order was carefully drawn so as to apply only to deception in the presentation of "a test, experiment or demonstration" that \* \* \* is represented to the public as actual proof of a claim made for the product" (R. 133).

So limited, the order does not interfere with any legitimate need of sponsors. The limitations of television may justify the undisclosed use of substitutes merely to portray a sponsor's product or illustrate its use, but no legitimate needs of sponsors justify the harm done by false representations that a sponsor is furnishing experimental proof of a product characteristic. It is, of course, true that the technical limitations of television may prevent a sponsor from showing on television an experiment which it can perform and has performed elsewhere. But if the sponsor

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<sup>5</sup> As the court below noted, the Commission has indicated that the word "demonstration" is "to be read by the rule of *eiusdem generis*" to mean "demonstration 'in the nature of a test or experiment'" (R. 134).



cannot prove its claim experimentally on television, it may still report and illustrate the tests it has performed elsewhere, so long as it lets the viewer know the truth—that he has only the sponsor's word and not visual proof to justify his belief in the sponsor's claim.

On the other hand, the harms of sham "proofs" are great. At a minimum, like false statements that an offer is being made only to selected persons, they "give a competitive advantage to the less scrupulous seller and \* \* \* not only add nothing to the buyer's opportunities to buy wisely, but hold out to him false inducements." *Federal Trade Commission v. Standard Education Society, supra*, 86 F. 2d at 696. But the harms go far beyond those involved in the *Standard Education* case.

One way in which television's quality as a "live" medium has revolutionized advertising is by enabling the advertiser not merely to assert the merits of his product, but to provide "see for yourself" proof by tests, experiments, and other demonstrations. The importance of such proof to truthful advertising is obvious. Because many sponsors will exaggerate the merits of their product, many television viewers are unimpressed with a mere claim as to a product's capabilities. For example, skeptical viewers will take "with a grain of salt" a sponsor's claim that his shaving cream can enable one to shave sandpaper, because the claim may well exaggerate—if it states at all—such subtle but highly important facts as what grade of sandpaper is used, how long it must soak, and how

hard one must press to shave it. A sponsor can reach these skeptical viewers if he can show an experimental proof of his claim. For such proof both shows the viewer exactly what is claimed for the product and, at the same time, allays any fear of exaggeration by offering an additional specific representation that the viewer is seeing these capabilities for himself.

The revolutionary capability of television—the capacity to demonstrate the truth of a claim to prospective buyers—is nullified by the decision below. If sham tests are permissible, there is no means by which the sellers of a superior product can convince skeptical purchasers of the truthfulness of their claims by furnishing visual, experimental proof to confirm their say-so. For the viewer will not be able to distinguish the real experimental proof from the rigged test and therefore will not be able to rely on any televised “demonstration” of superiority. The resulting loss will fall as heavily upon purchasers who want the certainty of visual proof as upon those sellers who in fact have a superior product and can prove it on television by an honest experiment. Both are entitled to be protected in their right to use this avenue of trustworthy communication made possible by television; and enjoyment of this right requires the prohibition of rigged experiments and tests which are falsely represented as proof of product claims.\*

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\* Respondents have argued that a prohibition of rigged experiments discriminates unfairly against those sellers of a superior product who cannot prove their claims because of the

There are additional harms as well. Because purchasers presumably will pay more for a product if they believe its characteristics have been verified before their eyes by a televised experiment, a fake experiment causes them to pay for something they do not receive—objective confirmation of the sponsor's claims. Similarly, the increased certainty and confidence that comes with visual "proof" of a sponsor's claims is likely to induce purchasers to buy a product which they believe has been "tested" before their eyes on television rather than another which, were it not for the misrepresentation of "proof," they would have preferred.

B. The court below rested its decision in large part upon the problems of compliance, administration, and enforcement that it anticipated would be caused by the difficulties of distinguishing the prohibited misrepresentations of visual, experimental tests from the permitted uses of mock-ups or substitutes in other television commercials. But here, too, the judgment of the agency charged with administering the statute should have been accepted unless it is manifestly wrong; and here, too, the Commission's judgment was more than justified. We believe that the crucial terms of the order—experiment, test, or similar demonstration purporting to furnish visual proof of a product characteristic—are as specific as possible technical limitations of television. But neither these sellers nor those who can in fact prove their claims on television will enjoy the benefits of convincing skeptical viewers if the viewer knows that what purports to be an experimental proof need be nothing more than a dramatic portrayal of a sponsor's claim for his product.

and as precise as those generally involved either in the law of tortious misrepresentation (e.g., the distinction between permitted representations of opinion and actionable representations of fact) or in the law of fair trade practices (see, e.g., *Rhodes Pharmacal Co. v. Federal Trade Commission*, 208 F. 2d 232 (C.A. 7), reversed, 348 U.S. 940). But the Commission's power also rests on a broader ground than this.

No order can ever be completely precise. Depending on the nature of the prohibited transaction, every order will leave a broader or narrower borderline area where its applicability will be uncertain. An administrative agency should make its order as precise as possible to prohibit only what is objectionable and to define as carefully as possible what is permissible. But once the agency has satisfied these requirements, it cannot be compelled to sanction objectionable activities because of the limited ambiguities inherent in any order prohibiting them. Admittedly, there will be a number of cases in which the line is narrow between a representation that experimental proof is being furnished and a mere portrayal of a product's characteristics. There are also many cases which fall plainly on one side or the other of that line. In this situation, even the existence of a comparatively broad borderline area is no justification for failing to prohibit plain violations of the statute.

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<sup>1</sup> To take only one example, there is little question in cases where the sponsor has stated expressly that a televised test is providing proof of his claims.

There are other, far less drastic, remedies for whatever uncertainty is inherent in any order prohibiting a particular class of violations of the statute. In the present case respondents need not act at their peril in regard to those matters as to which the application of the order is not completely certain. The Commission is obliged to give the respondent definitive advice, in advance, as to whether proposed conduct would meet the requirements of the order.\* See,

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\* The Commission's revised Rules of Practice for Adjudicative Proceedings (28 Fed. Reg. 7080, 7091 (July 11, 1963)), which apply to this order, provide:

"Sec. 3.26(b) Any respondent subject to a Commission order may request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance with such order. The request for advice should be submitted in writing to the Secretary of the Commission and should include full and complete information regarding the proposed course of action. On the basis of the facts submitted, as well as other information available to the Commission, the Commission will inform the respondent whether or not the proposed course of action, if pursued, would constitute compliance with its order.

"(c) The Commission may at any time reconsider its approval of any report of compliance or any advice given under this section and, where the public interest requires, rescind or revoke its prior approval or advice. In such event the respondent will be given notice of the Commission's intent to revoke or rescind and will be given an opportunity to submit its views to the Commission. The Commission will not proceed against a respondent for violation of an order with respect to any action which was taken in good faith reliance upon the Commission's approval or advice under this section, where all relevant facts were fully, completely and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval."

*Foremost Dairies, Inc.*, 3 CCH Trade Reg. Rep. 116435, 21303, 21306 (F.T.C. 1963). As Judge Friendly pointed out in *Vanity Fair Paper Mills, Inc. v. Federal Trade Commission*, 311 F. 2d 480, 488 (C.A. 2):

The difficulties respondent foresees in determining whether it is complying with the order seems factitious. The order contains the usual provision for the filing of a report of compliance, 16 C.F.R. § 3.26, and it is scarcely likely that if respondent proposes a method of compliance which the Commission accepts, and thereafter follows it, the Commission will subsequently and without notice claim a violation entailing the civil penalties of 15 U.S.C. § 21(1). If at some future time respondent should desire to change to a procedure different from what it originally proposed, it need not proceed at its peril. The Commission's offices will still be open for discussion \* \* \*.

Finally, if even those protections are less than 100 percent effective in eliminating all uncertainty in the borderline area between what is permitted and what is forbidden by the order, respondents still need not subject themselves to civil penalties. They can avoid the borderline area altogether simply by avoiding any suggestion that they are furnishing experimental proof of their claims when they are not. As Judge Prettyman said, in dealing with a similar challenge to another Commission order, the order becomes uncertain "only when one attempts to come as close to the line of misrepresentation as the Commission will permit." *Edward P. Paul & Company v. Federal Trade Commission*, 169 F. 2d 294,



296 (C.A.D.C.). "Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines v. United States*, 342 U.S. 337, 340. See also, *Federal Trade Commission v. National Lead Company*, 352 U.S. 419, 431 ("those caught violating the Act must expect some fencing in").

#### CONCLUSION

The Commission acted well within its statutory authority in prohibiting the practice of presenting rigged or sham tests, experiments, or other such demonstrations that are represented as actual proof of a product claim. The judgment of the court of appeals should, therefore, be reversed and the case remanded to that court for entry of judgment affirming and enforcing the Commission's order.

Respectfully submitted.

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SEPTEMBER 1964.

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IN THE  
**Supreme Court of the United States**  
October Term, 1964

No. 62

**FEDERAL TRADE COMMISSION,**

*Petitioner,*

v.

**COLGATE-PALMOLIVE COMPANY and  
TED BATES & COMPANY, INC.,**

*Respondents.*

**BRIEF OF ASSOCIATION OF NATIONAL  
ADVERTISERS, INC., AS AMICUS CURIAE**

**GILBERT H. WEIL,**  
*Attorney for Association of National  
Advertisers, Inc., as Amicus Curiae.*

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---

**BRIEF OF ASSOCIATION OF NATIONAL  
ADVERTISERS, INC., AS AMICUS CURIAE**

---

**Interest of Amicus Curiae<sup>1</sup>**

"Everyone knows that on TV all that glisters is not gold. On a black and white screen, white looks gray and blue looks white: the lily must be painted. Coffee looks like mud. Real ice cream melts much more quickly than that firm but fake sundae. The plain fact is, except by props and mock-ups some objects cannot be shown on television as the viewer, in his mind's eye, knows the essence of the objects.

"The technical limitations of television, driv[e] product manufacturers to the substitution of mock-up for the genuine article, if they wish to use what they may regard as perhaps their most effective advertising medium, . . . ."<sup>2</sup>

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<sup>1</sup> The parties to this appeal have consented to filing of the within brief.

<sup>2</sup> *Carier Products, Inc. v. F.T.C.*, 323 F. 2d 523; 525 (5 Cir. 1963). Similarly, the court below, in the within case, stated, as footnote 2 in its opinion of December 17, 1963 (326 F. 2d 517, 519):

The Association of National Advertisers, Inc. (ANA) is a non-profit trade association of the very "product manufacturers" who wish to use this "most effective advertising medium". Its membership embraces approximately 700 companies, representing a wide cross-section of industry.<sup>3</sup> While ANA members make use of every advertising medium, its interest in this particular appeal is strengthened by the fact that its members represent the bulk of the national support for television, as 85 of the 100 leading users of that medium are ANA members.<sup>4</sup>

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[continued from page 1]

"It is recognized for example, that the brown color of iced tea disappears, so that it looks like water. Blue shirts must be worn to simulate natural white. The sand on sandpaper, it was found in this case, fails to reproduce, leaving an apparently plain surface. Some substances which may photograph correctly, such as ice cream or frosting, or the head on beer, melt under the hot lights. In other cases so many retakes may be required that even the actor might fade with repeated consumption of the advertised product. For these and similar reasons, physical properties must sometimes be 'made up' or entirely replaced by 'mock-ups' although the result is a faithful and accurate portrayal."

<sup>3</sup> The industry classifications of its members include Agricultural Equipment; Automotive; Automotive Accessories; Brewing; Building Materials; Chemicals; Clothing and Textiles; Drug and Toiletries; Electrical Equipment; Food and Grocery; Industry Trade Associations; Insurance; Jewelry; Optical; Photographic; Sports Goods; Liquor and Wine; Metals, Basic; Non-Electrical Household Furnishings; Office Equipment; Paper; Petroleum; Soaps, Cleansers, Polishes; Soft Drinks; Tire and Rubber; Tobacco; Travel and Transportation; Industrial (other than metals or chemicals).

<sup>4</sup> Advertising Age, April 17, 1964, at page 11, lists the following as the 100 leading users of television advertising for 1963. We have added asterisks to indicate those who are members of ANA.

[continued on page 3]



The objects of ANA, as concisely stated in Article III of its Constitution, are " . . . the safeguarding of the essential values in advertising as an instrument for inducing sales; the elimination of waste and inefficiency in

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- |                            |                                  |
|----------------------------|----------------------------------|
| *Proctor & Gamble          | Anheuser-Busch                   |
| *Colgate-Palmolive         | *Nestlé Co.                      |
| *American Home Products    | *Richardson-Merrill              |
| *Bristol-Myers             | General Motors/Dealers           |
| *General Foods             | *Purex Corp.                     |
| *Lever Brothers            | Food Manufacturers Inc.          |
| *R. J. Reynolds Tobacco    | Simoniz Co.                      |
| *Alberto-Culver            | *Consolidated Cigar              |
| *General Mills             | *Borden                          |
| *General Motors            | *Avon Products                   |
| *Gillette                  | *American Cyanamid               |
| *Kellogg                   | *Falst <sup>er</sup> Brewing     |
| *Coca-Cola/Bottlers        | *Quaker Oats                     |
| *Philip Morris             | *Distillers Corp., Seagrams Ltd. |
| *Miles Laboratories        | *Andrew Jergens Co.              |
| *American Tobacco          | *Eastman Kodak                   |
| *P. Lorillard              | *Pabst Brewing                   |
| *Warner-Lambert            | *Carnation                       |
| *Liggett & Myers           | Sears, Roebuck                   |
| *William Wrigley Jr.       | *Drackett Co.                    |
| *Campbell Soup             | *Kimberly-Clark                  |
| *Brown & Williamson        | *Mattel                          |
| *Sterling Drug             | *Frito-Lay                       |
| *National Biscuit          | *Noxzema Chemical                |
| *Ford Motor                | *Revlon                          |
| *Ralston Purina            | *Socony Mobil Oil                |
| *Corn Products Co.         | *Shulton                         |
| *Block Drug                | *American Motors                 |
| *National Dairy Products   | *H. J. Heinz                     |
| *J. B. Williams            | *Lehn & Fink Products            |
| Pepsi-Cola/Bottlers        | Sunbeam                          |
| *Chesebrough-Pond's        | *Canadian Breweries              |
| *S. C. Johnson & Son       | *Kaiser Industries               |
| *Chrysler Corp.            | *Reynolds Metals                 |
| *Joseph E. Schlitz Brewing | *Armstrong Cork                  |
| International Latex        | *U. S. Borax & Chemical          |
| *Pillsbury                 | *Norwich Pharmacal               |
| *Menley & James Labs.      | *R. T. French                    |
| *Standard Brands           | *Prudential Insurance            |

[continued on page 4]

the process of distributing goods, wares and merchandise; the furtherance of the science of advertising and marketing; and the promotion of the common interest and welfare of its members, as buyers of advertising, and otherwise." Under its responsibilities, as thus chartered, ANA sets forth herein its legal arguments in opposition to a concept the Federal Trade Commission seeks to enforce which would seriously impair advertisers' ability to use television most effectively, and in a manner that is entirely fair and non-injurious to the public.<sup>5</sup>

The interest and argument of *amicus* on this appeal do not extend to any aspect of the case which might concern alleged misrepresentation—even by means of props or mock-ups—as to the qualities, characteristics, performance, or test responses of the advertised product.

The Commission's petition for certiorari described the question presented" as "Whether the Federal Trade Commission may prohibit, as an unfair or deceptive trade practice, the representation that a test, experiment, or similar demonstration shown on television provides the viewer with visual proof of a product claim (which may itself be true), when the test is a sham which proves nothing because of the undisclosed use of a 'mock-up' in the

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[continued from page 3]

\*Shell Oil  
 \*Carter Products  
 \*Beech-Nut Life Savers  
 \*Armour  
 \*E. I. duPont de Nemours  
 \*Johnson & Johnson  
 \*General Electric  
 \*Continental Baking  
 Ford Motor/Dealers  
 Helene Curtis Industries  
 \*Scott Paper  
 Charles Pfizer & Co.

\*General Cigar  
 Beecham Products  
 Chrysler/Dealers  
 Royal Crown/Bottlers  
 \*Goodyear Tire & Rubber  
 \*Radio Corp. of America  
 \*Union Carbide  
 \*Theo. Hamm Brewing  
 \*Seven-Up Co.  
 Green Giant

<sup>5</sup> Comment, Illusion or Deception: The Use of "Props" and "Mock-ups" in Television Advertising. 72 Yale L. J. 145, 153-158 (1962).

test." In its brief, on the other hand, the Commission omits from its "Question Presented" (page 2) the parenthetical phrase "which may itself be true".

If this means that the Commission now accepts that merely using a substitute for an authentic component in the course of a televised or printed depiction of a test or demonstration is not unlawful where 1) the product claim is true, and 2) the test, experiment or other similar demonstration can in fact be performed as portrayed, and would look the same in real life when done with genuine components as it does over television or in print when depicted with the aid of props or mock-ups, *amicus curiae* loses further interest in this appeal.<sup>6</sup>

It seems, however, from the Commission's arguments, which will be discussed below, and from its use of the words "observed test" in its brief to define the question presented, rather than "test", as in its petition for certiorari, that it holds out for a *per se* illegality in the mere act of visually depicting a conscientious facsimile of a demonstration in place of the demonstration itself.

### Summary of Argument

It is not an unfair or deceptive act or practice within the meaning of § 5(a)(1) of the Federal Trade Commission Act,<sup>7</sup> to use a prop or mock-up to produce a picture

<sup>6</sup> In phase with the court below, "By hypothesis we are not talking about misrepresentation of any quality or appearance of the product, or whether it can or cannot perform the 'test' which it is claimed to accomplish. We are considering no basic deception, but only the situation where, in illustrating faithfully a test which has been actually performed, an advertiser uses some foreign mock-up or make-up." 326 F. 2d at p. 521.

<sup>7</sup> "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." 15 U. S. C. § 45(a)(1).

which is materially the same as what one would see if he were observing the same display or demonstration without the intervention of the advertising medium<sup>8</sup> and without the use of such prop or mock-up. A proceeding by the Commission to prohibit such use of props or mock-ups is not in the interest of the public within the meaning of § 5(b) of the Federal Trade Commission Act.<sup>9</sup>

## ARGUMENT

### POINT I

**Undisclosed use of technical aids, including props or mock-ups, to produce an advertisement is not actionably deceptive, when the picture they create is a faithful duplicate of the authentic product or demonstration they purport to represent.**

The legal issue is a clearly drawn one.

The Commission urges that where a visual display or demonstration is offered to substantiate a claimed fact, it is illegally deceptive if the components of the picture are not the genuine items they seem to be; for, asserts the Commission, under those circumstances what is being shown is not in truth the proof it is held forth to constitute.

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<sup>8</sup> While this case involves television, the order would seem equally applicable to magazine, newspaper, billboard, direct mail, handbill or any other form of pictorial advertising.

<sup>9</sup> "Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be in the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect. \* \* \*" (Emphasis added.) 15 U. S. C. § 45(b).

Passing, *arguendo*, the highly debatable proposition that there is inevitably implicit in a visual demonstration a promise that no prop has been used, our answer is that, assuming the existence of undisclosed artifice, the conclusion does not follow that it is material deception, or a public injury, where what the viewer sees does not materially differ from what he would have seen had genuine articles or procedures been used rather than props or mock-ups.<sup>10</sup>

The caliber of the Commission's argument is indicated by this very fact, that if it prevails there will be not the slightest difference in what the viewer sees in an advertising illustration, or in the truthfulness of the message it imports. Assuming that the technical vagaries of the medium do not distort the authentic product or event into a false image, the picture one sees will be identical, whether the true or a simulated article or demonstration is used as the photographed model; and the essential meaning of its communication, as to the nature and qualities of the wares, will be unchanged.

<sup>10</sup> The Commission's order being directed only against "undisclosed" use of props or mock-ups, the Court might justifiably wonder why the entire problem may not be simply solved by disclosure.

Initially, of course, this is a begging of the question. If, as will be shown, the undisclosed use of the prop is not a material deception, there is no illegality to be rectified. Passing that, *arguendo*, there is the problem of time limitations in broadcast commercials, recognized by the court below in its allusion to " \* \* \* the inroads into the commercial's sixty seconds which would result from having to make the statement whenever mock-ups were used that the exhibition, though employing artificial aids, was a faithful portrayal of actual events, together with such other rehabilitating data as might be thought necessary to make the showing persuasive" (326 F. 2d at page 523). This would be compounded by the difficulty of clearly describing which portion of, and the extent to which the demonstration is artifice where only some of its elements are not genuine.

Stated most simply, then, the Commission concludes that a substantial body of the public, seeing a "demonstration"<sup>11</sup> depicted in an advertisement, will be moved to purchase the product if it believes that no prop or mock-up has been used, but will not wish to buy if it knows that such a device has been used, *even though it were also to know that the "demonstration" it sees is in all other respects wholly faithful to and an indistinguishable replica of the same demonstration when performed with the genuine product and test procedures.*

There is no evidence in this case to substantiate such a hypothetical determination and no basis for taking judicial notice that so strained a reaction is common to human experience. We witness an attempt by the Commission to establish a rule of law that such advertising is illegal *per se*.

The Commission's argument to justify this *ipse dixit* conclusion turns upon a false premise that there has been a so-called unchallenged "finding"<sup>12</sup> that the demonstration is made for the very purpose of inducing a purchase by convincing "otherwise skeptical viewers of the merits of Rapid Shave" (brief, p. 11);<sup>13</sup> and that what is thus offered is "rigged" and "could prove nothing as to the claimed effects" (*ibid.*); that such purchasers are "being tricked into making a purchase \* \* \* [by] false inducement" (*id.*, p. 9) in the form of " \* \* \* a rigged experimental 'proof' \* \* \* sham tests \* \* \* sham experiments" (*id.*, p. 16), "sham 'proof' " (*id.*, p. 19), and "a fake experiment" (*id.*, p. 21). Perhaps stung by the Court of Appeals' observation that

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<sup>11</sup> The meaning of "demonstration" in the Commissioner's order will be discussed below.

<sup>12</sup> *Amicus* understands that the respondents will argue there has been no such finding, and that if there had been it would not have been supported by any evidence.

<sup>13</sup> Accepting, *arguendo*, the stated purpose of the demonstration, *amicus* takes issue with the Commission's reasoning from there on.



such semantic indulgences are "long on generalities, short on analysis",<sup>14</sup> the Commission undertakes to rationalize the deception as residing in the viewers being misled into believing "that they have something more than the sponsor's say-so on which to base their purchasing decisions" (brief, p. 9), rather than "only the sponsor's word and not visual proof to justify [their] belief in the sponsor's claim" (*id.*, p. 19)—that they have "objective confirmation of the sponsor's claims" (*id.*, p. 21).

Here, then, may be the pivot of the case. We grant that if a test, experiment or demonstration such as the advertiser has described (whether by verbal or pictorial symbols should not differ in principle) could not be conducted, the Commission's characterizations of such misrepresentation would be valid. The argument falls apart, however, when in truth the demonstrations can be and have been performed, and the product reacts as depicted in the commercial. In those circumstances the purchaser does have something more than just the sponsor's word; he has the test as proof—objective confirmation of the very kind he is told he has. The test itself exists and is not "rigged"; neither is it "sham proof," nor a "fake experiment."

Thus, the Commission's case rests upon nothing more substantial than its assumption (unsupported by any evidence) that the decision to purchase will be critically altered by the difference between seeing a completely faithful portrayal of an existent demonstration, and seeing the demonstration itself.

The flimsiness of this contention is underscored by the Commission's discomfort over having it applied to "undisclosed use of substitutes merely to portray a sponsor's product or illustrate its use" (brief, p. 18). In principle, there can be no distinction between a substitution to por-

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<sup>14</sup> 326 F. 2d at p. 522.

tray a product or illustrate its uses, and one to portray a demonstration or illustrate its operation.

To draw an example from this very case, if we correctly understand the Commission's statements it would readily permit an advertiser of sandpaper to use a plexi-glass and sand mock-up in order to portray the advertised sandpaper, but it would forbid a shaving cream manufacturer to do so in accurately depicting a test or demonstration of his product, even though both sponsors labor under precisely the same technical problems of accurately conveying a picture of sandpaper to the television viewing audience.

In both instances the viewers are being given what purports to be actual visual demonstration of the appearance and character of sandpaper instead of having "only the sponsor's word" for it; and if, as the Commission now concedes, one is lawful, the other must be so, too.

The real point is that as long as the sponsor's persuasion of purchasers that visual proof corroborates his product claim does not mislead them regarding the existence of such proof, there is no material deception whether it relates to the appearance or the functioning of a product in use or to its appearance or functioning under the conditions of a test or demonstration. Indeed, the difficulty of finding a real difference in the Commission's purported distinction has been well delineated by the court below.<sup>15</sup>

An advertiser's motivation to use artifice in the production of visual advertisements is not born of a desire to deceive. It is generated by technical considerations. The use of make-up, studio or stage lighting, dark room

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<sup>15</sup> 326 F. 2d at pp. 520-522.

techniques and the like have long been recognized and accepted as legitimate tools in the production of a finished picture, whether it be in print or on the stage, the moving picture screen, or, for that matter, in television itself. The physical natures of all these media are such that if the genuine article or demonstration were displayed or performed without technical compensations it would appear unreal to the viewer's eye.

Most television commercials are prepared on film or tape<sup>16</sup> and their production may involve several retakes—just as with a motion picture—before they are satisfactory. In many instances a product (such as a medicine, a hair dye, or even a food or beverage) cannot be re-used by the model throughout such repetitions (see footnote 2, page 2, above). A device must be employed so that whichever of the “takes” is ultimately used for telecast will appear to present a genuine use of the article by the actor, even though such may not be the fact.

As long as an artifice presents to the viewer the same visual image and impression he would receive were he to observe the genuine article or event at first hand and without the intervention of either television transmission or artifice, it is difficult to comprehend what harm has been done, what material deception has been practiced, or what illegality, committed.<sup>17</sup>

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<sup>16</sup> “We may take judicial notice that commercials are normally prerecorded.” Opinion below, 326 F. 2d at p. 522.

<sup>17</sup> It is interesting to note that Commissioner Elman, who wrote the opinions of the Commission below in this case, severely criticized the majority of the Commission in another matter (and was resoundingly vindicated on appeal) on the ground that “nowhere does the Commission explain what was ‘unfair or deceptive’ about what Mary Carter did.” *Mary Carter Paint Co., et al. v. F. T. C.*, 333 F. 2d 654, 657 (5 Cir. 1964).

What the Commission is quarreling with is not the substantive content of the representation, but the mechanical means by which it is communicated.

The Commission offers a number of precedents, which are not really analogous, to support this avenue of attack (brief, pp. 14-15). The court below has summarized and analyzed this class of authorities at 326 F. 2d, pp. 520-523. The only additional observation that might be made here is that they are not in point, for involved in all of them is the misrepresentation of a separate and distinct ("extrinsic") fact, which in and of itself can materially affect the consumer's purchase decision. Thus, a person who might not buy upon a seller's claim as to the quality of its product could very well be persuaded by misplaced belief in the independent fact that "The X testing agency" (brief, p. 15) had checked and verified it. In the situation under discussion, however, the representation, made by visual devices, is that the product actually looks a certain way, or when subjected to a certain test really responds in a demonstrated manner. Such "extrinsic" representations are not false, but true.

To illustrate more comparably from the Commission's own examples, suppose that in the case of the advertised testing agency certification the endorsement had in fact been given, and that the commercial depicted a representative of the agency transmitting it to the advertiser. Mere undisclosed use of an actor in place of the actual attestor could hardly be deemed materially, and hence unlawfully, deceptive.<sup>18</sup>

Taken at its strongest, the Commission's case, in the ultimate analysis, rests upon nothing more than the difference between a representation that the viewer is observing

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<sup>18</sup> Note the similar observation of the court below that mocking-up a testimonial document to overcome photographic difficulties in reproducing the original would not be unlawful. 326 F. 2d at p. 522, footnote 14.

a demonstration in actual progress, and the fact that he could and would see exactly the depicted demonstration going on except for technical limitations of the advertising medium.

The objective of the sponsor's commercial is to persuade the audience that such objective proof exists to corroborate a claim made for the product; and, in all truth, such proof does exist.

This, urges the Commission, is nonetheless unlawful.

There is also an apparent contention by the Commission that it requires a *per se* rule of illegality for props and mock-ups to facilitate its policing activities.<sup>19</sup> Suffice it to say that Section 5 of the Federal Trade Commission Act empowers it to enjoin only those activities that are unfair or deceptive. It does not, nor does any other charter, authorize the Commission to enjoin fair and non-deceptive acts or practices.

Finally, the Commission urges, at pages 22-24 of its brief, that its cease and desist order is valid because the respondents can consult in the future with the Commission to ascertain its application to a specific situation. This misses the point. The only question respondents could then debate would be whether the contemplated conduct falls within the language of the order. Issues of substantive validity of the cease and desist order itself would be foreclosed.

Subsequent consultations with the Commission, limited to construing what the order forbids,<sup>19a</sup> would not leave

<sup>19</sup> Brief, p. 21; 326 F. 2d at p. 523, footnote 17.

<sup>19a</sup> Even where questions of construction are concerned the ability of a respondent to argue its substantive rights is severely curtailed. Cf. *United States v. Vulcanized Rubber & Plastics Co.*, 288 F. 2d 257 (3 Cir. 1961), *cert. den.* 368 U. S. 821 (1961), especially in light of Judge Hastie's dissenting opinion.

room for controverting the legal right of the Commission to impose a prohibition which the language of the order is held to embrace. The latter is not a matter of administrative discretion. It is a question of law, subject to final review by this Court; and is properly before it for determination at this time.

The language of *Vanity Fair Paper Mills, Inc. v. F. T. C.*, 311 F. 2d 480, 488 upon which the Commission relies was uttered in entirely different circumstances. Brought under § 2(d) of the Robinson-Patman Act, the question was whether general, rather than specific, proscriptive language could be used to enjoin promotional payments to one customer that would not be "available" to all other competing customers. There was no issue as to the Commission's substantive right to prohibit such discriminatory practices; the only problem was over the form of order to be used in doing so; i.e., whether it could be worded in terms only slightly less general than "the Delphic terms"<sup>19b</sup> of the statute itself, or whether it should specifically describe what conduct was prohibited and what permitted. In the within case, however, it is the basic legality of conduct which the wording of the Commission's order embraces that is in dispute. Such a substantive determination is not to be left for later consultations.

## POINT II

**It is not in the public interest to obstruct effective use of television advertising by prohibiting harmless technical production procedures.**

The Commission argues that its judgment as to what is harmful to the public should not be questioned by the courts.<sup>20</sup> This is not entirely correct.

<sup>19b</sup> 311 F. 2d at p. 485.

<sup>20</sup> Commission's Petition for Certiorari, pp. 13-17 (brief, p. 21).



Not only is the propriety of the Commission's conclusion that given facts constitute an unfair act or deceptive practice within the meaning of Section 5 of the Federal Trade Commission Act a question of law properly subject to judicial review,<sup>21</sup> but the question of requisite public interest under Section 5(b) of the same Act is also one for ultimate determination in the courts,<sup>22</sup> notwithstanding the fact that they will ordinarily attach great weight to the Commission's views in deciding that issue.<sup>23</sup>

Resolution of the first of these two legal issues, i.e., that of unlawful deception, will probably make it unnecessary for this Court to consider the second. In connection with the latter, however, it may be pointed out that in the situation at bar public interest is not a one-way street. While nothing overrides the importance of prohibiting material deception, attention may legitimately be given to the desirability of not unwisely or unnecessarily obstructing the most effective advertising use that can wholesomely be made of television. For one thing, the current economy of this nation depends critically upon successful mass selling of mass produced goods. The direct relationship of television advertising to that goal cannot be doubted. And the television industry itself, with the so-far minor exception of pay television, derives its financial support solely from advertising.

If advertisers are deterred, for tenuous and inconsequential reasons, from employing technical devices which the very nature of the medium requires if it is to be used advantageously for advertising purposes, and which have not been shown to affect the consumer in any substantial, material, or significant manner, their use of the medium

<sup>21</sup> *Mary Carter Paint Co.*, *supra*, p. 11.

<sup>22</sup> *FTC v. Klesner*, 280 U. S. 19 (1929).

<sup>23</sup> *Exposition Press, Inc. v. FTC*, 295 F. 2d 869 (2 Cir. 1961), *cert. den.* 370 U. S. 917 (1962).

will be seriously curtailed, and the tremendous public interest in this outstanding medium of news, entertainment and information may be put upon the altar of an administrative obsession.<sup>24</sup>

Respectfully submitted,

GILBERT H. WEIL,

*Attorney for Association of National  
Advertisers, Inc., as Amicus Curiae.*

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<sup>24</sup> "The Carter order bears an obvious resemblance to the Colgate-Palmolive order which was framed at a time when the Commission was unyielding in its hostility to mock-ups." *Carter Products Inc., et al. v. F. T. C.*, 323 F. 2d, at page 532 (5 Cir. 1963).

" \* \* \* much importance beyond this particular case has become attached to the Commission's antipathy to mock-ups, \* \* \*." Opinion below, 326 F. 2d, at page 519.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1964

No. 62

FEDERAL TRADE COMMISSION,

v.

*Petitioner,*

COLGATE-PALMOLIVE COMPANY and  
TED BATES & COMPANY, INC.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT

**BRIEF FOR THE AMERICAN ASSOCIATION OF  
ADVERTISING AGENCIES, INC. AS AMICUS CURIAE**

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November 1964

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**BRIEF FOR THE AMERICAN ASSOCIATION OF  
ADVERTISING AGENCIES, INC. AS AMICUS CURIAE**

The American Association of Advertising-Agencies, Inc. files this brief *amicus curiae* pursuant to the written consents of the parties hereto. The consents have been filed with the Court.

**Interest of Amicus Curiae**

The 348 members of the American Association of Advertising Agencies plan, create and place some 75 percent of all national advertising. The Association strives to foster conditions in which good advertising and good advertising agencies can flourish. As part of that effort



it actively opposes advertising that is false or in bad taste.<sup>1</sup> It equally opposes limitations on the freedom of agencies to produce effective advertising that is truthful and in good taste.

The theory upon which the Federal Trade Commission has brought this appeal—namely, that the undisclosed use of mock-ups to communicate truthful advertising claims is *ipso facto* illegal—strikes at advertising effectiveness, not advertising dishonesty. The Commission looks upon this case as “a test case of major importance with respect to the Commission’s power to prevent deception in television advertising, in the interest of both the consuming public and honest advertisers” (Pet. for Cert. p. 8). The Association considers, rather, that the power sought by the Commission would extend far beyond the prevention of deception or any other function that has been entrusted to it by law. The mere existence of such power would hamper the work of honest advertisers and advertising agencies without a particle of countervailing benefit to the public. The Association respectfully submits its reasons of law and policy why that power should be denied to the Commission and the decision of the Court of Appeals affirmed.

<sup>1</sup> Its members pledge that they will not knowingly produce dishonest or distasteful advertising as specified and condemned in its Creative Code. For many years it has conducted an Interchange of Opinion, operated jointly with the Association of National Advertisers since 1960, for the purpose of obtaining voluntary withdrawal or correction of objectionable advertising. The effectiveness of this program has been publicly cited. U. S. DEPT OF COMMERCE, SELF-REGULATION IN ADVERTISING 37-43 (1964); KINTNER, AN ANTI-TRUST PRIMER 208-210 (1964); Address by the Hon. Paul Rand Dixon, Chairman, Federal Trade Commission, at St. Louis Regional Consumer Conference, April 16, 1964.

### **Question Presented**

This brief will discuss the question: Does the Federal Trade Commission have the power under Section 5 of the Federal Trade Commission Act to prohibit the undisclosed use of mock-ups or product-substitutes in advertising to communicate product claims that are truthful in every material respect?

### **Statement**

This statement treats only those aspects of the case that relate to the interest of the Association and its members.

The complaint charged that the respondents had violated Section 5 of the Federal Trade Commission Act by misrepresenting the moisturizing properties of Palmolive Rapid Shave Cream in television commercials. The commercials purported to show by a visual demonstration how sandpaper could be shaved with a safety razor after application of the cream. The demonstration did not employ sandpaper at all, but a simulated mock-up of sand on plexiglass (R. 35). The Commission found that sandpaper cannot be shaved under the conditions depicted in the commercials and concluded that respondents had therefore misrepresented the product's moisturizing properties in violation of Section 5 (R. 14-18). Upon appeal, the Court of Appeals for the First Circuit sustained the Commission in this finding and conclusion (R. 35-39).

The case, then, is basically one in which it has been determined that the respondents, through the use of a mock-up, made a misleading claim about the product advertised.

The Commission, however, proceeded to transform this case into a new and different one—a case it never brought

—by injecting the hypothetical assumption that sandpaper, contrary to its own finding, *could* be shaved exactly as depicted. The use of a mock-up to communicate such a claim, even though assumed to be truthful in every respect, would nevertheless, it held, have constituted unfair and deceptive advertising because the test “was, in reality, not taking place” (R. 18-21). On this theory the Commission entered an order that sweepingly proscribed the undisclosed use of mock-ups without regard to the truthfulness of the claims made for the product (R. 8).

The Court of Appeals rejected this theory and set aside the order *in toto* because it was “permeated” with the Commission’s “fundamental error” (R. 39-43). The Commission thereupon renovated its opinion (R. 47-60) “to restate with clarity and precision the basis and breadth” of its findings and order (R. 98) and revamped its final order accordingly (R. 93-95). The restatement did not eradicate the “fundamental error.” The Court of Appeals set aside the second order for the same reasons it had set aside the first and admonished the Commission to enter an order “confined to the facts of this case” (R. 139).

This tortuous procedure demonstrates that the Commission has indeed been “preoccupied with its broad opposition to mock-ups” (*ibid.*) rather than with the actual misconduct charged and found.<sup>2</sup> Since its pet theory does not emerge from the facts of the case, it has improvised a novel kind of order that cannot be justified by those facts in order to indulge a proposition constructed out of a hypothesis. The Association submits that this is an inadequate basis for presenting “a test case of major importance.”

<sup>2</sup> The Commission’s “unyielding hostility” to mock-ups was also noted by the court in *Carter Products, Inc. v. F.T.C.*, 323 F. 2d 523, 532 (5th Cir. 1963).

There are several major objections to this posture of the appeal. Of first importance is the lack of any evidence relative to the use of mock-ups to convey a truthful product claim. The testimony before the hearing examiner focused on the question whether the sandpaper test could or could not be performed as depicted on the television screen, and that issue was determined against the respondents. What the record contains about the non-deceptive use of mock-ups rests, not on evidence, but on nothing better than matters of assumed common knowledge, chance personal observations and reactions, surmises, speculations —altogether a shaky foundation on which to predicate a request for new and far-reaching powers.

In the second place, the evidentiary vacuum respecting the honest use of mock-ups tends to be filled up by inferences from a deceptive use. Indeed, the Government's obsession with the idea of deception infects and colors its argument throughout. Its very framing of the question presented assumes that the test is "in truth a sham" (Gov't Br. p. 2), and epithets like "sham" "rigged," "tricked," and "fake" pepper its brief (pp. 3, 8, 10, 11, 16, 17, 19, 20, 21, 25). From this commingling of the honest with the dishonest springs its "fundamental error," as the argument will show.

Finally, in an attempt to play down the practical consequences of its theory of mock-ups, the Government claims that the Commission's revised order applies only to their use in the presentation of a "test, experiment or demonstration in the nature of a test or experiment" and "does not reach the use of substitutes in the great majority of television commercials: those which merely state and portray a product claim" (Gov't Br. p. 18). The order, therefore, it is contended, "does not interfere with any legitimate need of sponsors" (*Ibid.*). Whether this distinction is

viable with reference to the terms of the order is one thing; the precise meaning of the order is best left to the parties. But if the distinction is viable, then what the Commission is seeking in the order encompasses substantially less than the full scope of its theory of mock-ups as restated "with clarity and precision" in its second opinion. Thus, to the extent that the Court may be swayed by consideration for the legitimate needs of advertisers and advertising agencies, the Association respectfully urges that it should not overlook the implications that the Commission is likely to draw if its order is approved.

The Association in its argument will first explore what those implications may be with reference to the legitimate needs of advertisers and advertising agencies. This will provide an appropriate context for its basic contention that the Commission's theory of mock-ups is utterly misconceived.

## SUMMARY OF ARGUMENT

According to the Commission's own formulation, its theory of mock-ups extends beyond their use in tests or experiments in any narrow sense. While it would permit the use of substitute materials in "a casual or incidental display," it objects to any use that is "material to the selling power" of a commercial. Since the appearance of a product ordinarily provides a major inducement to its purchase, there seems to be no definite limitation to the possible application of the theory or its interference with the legitimate needs of advertisers and advertising agencies.

The record before the Court does not evidence what those legitimate needs are. The Brief gives some

examples to illuminate the gap in the evidence and provide a clue to the complexity of the problems of achieving a realistic and faithful portrayal of objects on film or tape. The presentation of truthful claims may be needlessly burdened if mock-ups can be prohibited as *per se* illegal.

The undisclosed use of mock-ups in communicating a truthful advertising claim does not result in any deception of the consumer and accordingly cannot constitute an unfair or deceptive trade practice. The advertiser uses photographic images, like words, to communicate a proposition about his product. That proposition does not refer to an object in the studio but to something the consumer can buy, and the consumer so understands it. If he is induced to buy the product and verifies, or can verify, the truth of the proposition about it by which he was so induced, no deception has been practised upon him.

The Commission's theory does not relate to any propositions *about the product*, but solely to the technique of communicating such propositions. It has evolved an abstruse concept of implied "added representations" concerning the veridical nature of photographic images. This concept originates in a two-fold error: (1) its failure to recognize that the camera is only a tool, not an automatic certifier of truth, and (2) its inability to disentangle the honest use of mock-ups from a situation of deceptive use.

The power to regulate the use of mock-ups would add nothing to the Commission's present ability to prevent unfair and deceptive advertising practises. It would merely impose burdens and uncertainties on honest advertisers and advertising agencies and thereby hinder good-faith efforts to create effective advertising. Owing to the complexity of the advertising process, no procedure for



prior review of advertisements by the Commission, even if otherwise justifiable, could work. The hypothetical nature of this appeal and the lack of evidence relating to the legitimate use of mock-ups suggest that the Court should refrain from adopting a *per se* rule respecting the illegality of mock-ups and should affirm the judgment of the Court of Appeals.

## ARGUMENT

### I.

The theory propounded by the Commission to justify its order herein implies the existence of a broad and ill-defined power in the Commission to regulate the non-deceptive use of mock-ups in all kinds of advertising media.

#### A. The Nature of the Power Asserted by the Commission.

Whatever may be claimed as to the limitations of the Commission's third final order herein, the Commission's theory of mock-ups, as restated "with clarity and precision" in its second opinion, plainly extends beyond their use in tests or experiments in any narrow sense. The Commission there concedes that it may be permissible, because of technical deficiencies in the photographic process, to use substitute materials "in a casual or incidental display of a product that cannot be faithfully reproduced on the television screen" (R. 51). The true distinction is "between mock-ups that are used in demonstrations designed to prove visually a quality claimed for a product and are thus material to the selling power of a commercial, and those that are not" (*Ibid.*). By way of illustration,

the Commission would not object to "showing a person drinking what appears to be iced tea, but for technical photographic reasons is actually colored water, and saying 'I love Lipsom's tea,' assuming the appearance of the liquid is merely an incidental aspect of the commercial, is not presented as proof of the fine color or appearance of the tea, and thus in no practical sense would have a material effect in inducing sale of the product" (*Ibid.*). The Commission likewise would not object to the use of substitutes for ice cream or the foam on beer "in casual or incidental displays of the product, so long as the commercial does not seek thereby to prove visually the longevity or fine appearance of the product" (*Id.*, n. 1).

"Proof" of color or fine appearance does not require a "test or experiment or a demonstration in the nature of a test or experiment." All it requires is an image of the product. Pictures may demonstrate such qualities when they appear in printed advertisements just as fully as when they appear on television screens. Audible qualities may be portrayed on radio. It is difficult to comprehend, then, why the theory behind the Commission's order, if not the order itself, does not reach the use of substitutes in advertisements "which merely state and portray a product claim." Under what circumstances, moreover, does the Commission imagine that the "fine color or appearance" of an advertised product is merely incidental and not "material to the selling power" of the advertisement? Can the Commission really mean that it is material if the copy expressly alludes to the appearance and not when the appearance is allowed to speak for itself?

These few considerations are enough to indicate that the ambit of the Commission's theory, though restated with all the "precision and clarity" it can muster, remains

both extensive and ill-defined. What certainty can honest advertisers and advertising agencies have that their legitimate needs will not be interfered with?

## **B. The Legitimate Needs of Advertisers and Advertising Agencies.**

As stated above, the record is empty of evidence about the needs of advertisers and advertising agencies to use mock-ups, substitutes and the like in producing honest, effective advertising. There is recognition in opinions and arguments that photographic or video images do not necessarily convey the true color or texture of the object being photographed or televised, a fact frequently referred to as a "deficiency" in the photographic process (*e.g.*, R. 51).<sup>3</sup> It is also recognized that conditions, such as the heat of studio lights or the time-span required for takes may destroy or alter the object while it is being recorded (*e.g.*, R. 131, n. 2). Certain standard examples are reiterated—blue shirts, ice cream, the foam on beer—examples that might seem trivial, and that is all.

What is said here is not intended to supply any gap in the evidence, but merely to illuminate the nature of the gap that does exist. Mock-ups do fulfill a substantial need that may stem from a variety of causes other than the character of the image-making process.

Such a cause may be nothing less than the necessity for producing the advertising before the product to be advertised has come into existence. A conspicuous example is the advertising of new-model cars, which are introduced each year around the first of October in a multitude of body styles and colors. Production of the new

<sup>3</sup> The hearing examiner found that sandpaper, when placed under a television camera "appears to be nothing more than plain, colored paper; the texture or grain of the sandpaper is not shown" (R. 12).

models does not start until sometime in August, much too late to begin taking the photographs that must appear on announcement day in television commercials, magazine and newspaper advertising and the brochures distributed to thousands of dealers. "Hand made" cars, built to test engineering design and identical in construction, operation and appearance with the cars that will later roll off the assembly lines, are available for photography in a few body styles, but are far too costly to be made in all. The only practicable solution has been to use non-operational mock-ups having body shells made of plastic, fiberglass or clay and lacking engines, seats and other essential features of a real car. Care is taken in building and photographing the mock-ups to ensure accuracy in every visible detail, so that the appearance of the mock-ups in the photographs will be indistinguishable from that of the subsequent production line counterparts.<sup>4</sup> Car dealers who can have only two or three body styles on display in their showrooms must depend on these photographs of mock-ups in selling other new-model styles to their customers. Consumers, eager for a new-model car, may have no other guide to the style they wish to order without delay.

Similar problems may attend the introduction of new models of washers, refrigerators and other expensive hard goods items.

Design and color, as well as performance, are unquestionably of major importance to consumers in selecting cars, kitchen equipment and a host of other products. In the case of products such as cosmetics, the appearance is

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<sup>4</sup> The advertising and engineering staffs constantly cross-check to ensure that last-minute changes in body-trim, hub caps, etc. will be accurately portrayed. The realism and accuracy so obtained surpass what can be achieved through an artist's rendering.

the performance. But to demonstrate on film the effect of cosmetics, they must be applied more heavily than in real life.

The quality of the *ingredients* used in a product may often provide a significant point of appeal to the consumer yet defy illustration. For example, the flavor of coffee is affected by the age of the coffee beans selected for the blend. Aged coffee beans do not in actuality resemble green beans but cannot be told apart when filmed. The true difference may be conveyed through plastic beans or by coloring the aged beans.

Resort to larger-than-life reproductions or to microphotography may be necessary to show minute features of the *structure or composition* of a product at a range too close for the human eyes to focus.

The use of substitutes for the object shades over into the area of altering the appearance of the object or tailoring the recording process. The true rendering of colors may call for color correction, which may be obtained by tinting the objects or putting a filter over the lens.

Realistic representation may require polarized or infrared light. The retouching of color transparencies is widely practiced in magazine advertising.

Events unfold in time, and seldom is the whole sequence of events that demonstrate a product claim contained within the 60 seconds or less allotted to a commercial. Actual time must be compressed on the screen through conventions accepted by the viewer.

These examples give only a clue to the numerous and complex problems of achieving a realistic portrayal of objects on film or tape or by other recording techniques. Whether the solution is to use a mock-up, or to alter the appearance of the product, or to adjust the recording

process would seem to make no difference in logic, *provided* that the purpose and effect of every such treatment is the accurate and faithful representation of the reality, not its falsification.

It is therefore submitted that the Court cannot appreciate the value of mock-ups in advertising on the basis of the present record. The presentation of truthful claims concerning the color, composition, structure or operation of a product may be burdensome, needlessly expensive or completely impracticable unless a mock-up can be used. Such use is not incidental but vital to the selling power of the advertisement.

## II.

**The undisclosed use of a mock-up or other product-substitute in communicating a truthful advertising claim is not an unfair or deceptive trade practice.**

The Commission's theory of mock-ups cannot be considered dispassionately as long as it is muddled by colorations infused from its findings in the case before it. Since it is a hypothetical case that the Commission presents, the Commission should be held to the strict measure of its own assumed premise. The adjectives that spice the Government Brief—"sham," "rigged," "fake" and the like—do not inhere in that premise. We are entitled to assume that an honest advertising agency, seeking to create an honest and effective selling message for an honest advertiser, finds it desirable or even necessary, for reasons that may be more or less compelling but are nonetheless innocent, to use a mock-up in communicating a truthful claim about the advertised product. The Com-



mission says that the failure to disclose such use, no matter how truthful the product claim, is *ipso facto* a material deception of the consumer.

Under the Commission's theory it makes no difference that the product when bought by the consumer will correspond in every material respect with what he was led to believe by the advertisement. It makes no difference that the product looks the way he expected, performs the way he expected, is made of the materials and in the fashion he saw depicted, and can pass every test and meet every specification claimed for it in the advertisement. Wherein, then, lies the deception? According to the Commission, in a "false representation" as to what is going on before the camera, "intended and calculated to influence purchasers in making their purchasing decisions" (Gov't Br. pp. 11-12).

This position fundamentally confuses the meaning of a statement with the process by which it is communicated.

Advertising is the counterpart in selling of the machine in production. The advertiser does not come to the door like a salesman, holding out a product that can be seen, felt, handled, demonstrated and hopefully sold on the spot. He presents to the consumer, not the product itself, but a communication about it. The communication may be by words, oral or written; by drawings, cartoons, paintings and other art work; by photographic and other chemical or electronic recording devices, in a bewildering variety of techniques. But whatever the means employed, the communication can never take the place of the product itself in all its immediacy. At most it can symbolize, represent, or convey ideas or propositions about the product; it cannot grasp or reproduce the physical reality.

We recognize without much trouble that this is true when a proposition about a product is stated in words,

but it is no less true when the proposition is stated in pictures. Nobody believes that the image on the television screen is the product or even that it resembles the product in more than a superficial or conventional sense. No black and white image, for example, ever really resembles the colorful reality; it simply *tells* us things, conveys information, about the reality. In advertising, the image does not pretend to substitute for the product. Its function is to communicate ideas or propositions about the product in a way that is more lucid, vivid or informative than words alone could accomplish.

The viewer watching a commercial, like the reader of a printed advertisement, understands that the proposition being conveyed to him by words and pictures concerns a product he is being urged to buy. He understands that this product is not the object in the studio being taped or photographed or televised, but something offered for sale by the advertiser that he can shop for in a supermarket or order from a dealer. If he is induced to buy the product and verifies, or can verify, the truth of the proposition about it by which he was so induced, the expectations aroused by the advertisement will not have been disappointed and no deception will have been practised upon him.<sup>5</sup>

The Commission's opposition to mock-ups, then, is absolutely unrelated to the truthfulness or falsity of *any* proposition *about the product* that is offered for sale; it

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<sup>5</sup> The word "product," of course, refers not to any single thing but to a class of similar things, and the propositions about a product communicated by an advertisement are therefore general propositions about a class. They are truthful if they hold for the class as a whole, though an occasional member of the class may be defective. The purchaser who gets a "lemon" may have a claim against the seller or manufacturer; this does not mean the product claim was false.

relates solely and entirely to what are claimed to be misrepresentations about the *method of communicating* such propositions. The argument from so-called "extrinsic factors" (Gov't Br. pp. 13-15) does not support this unprecedented excursion from the purview of the Federal Trade Commission Act. Representations about the origin of a product, or how it is distributed, or who has used it with delight, are all propositions *about the product*, not about the way such propositions are communicated. Thus cases like *Federal Trade Commission v. Standard Education Society*, 86 F. 2d 692 (2d Cir. 1936), *modified*, 302 U. S. 112 (1937) do not reach the issue of truthful mock-ups which do not hold out false inducements. Neither do the supposed analogies proffered by the Commission (Gov't Br. p. 15). A false representation that a testing agency has "certified the capacity" of a product falls in the same category as a false testimonial—they are both false propositions *about the product*.

The key to the Commission's "fundamental error" lies in its statement that the respondents "sought to exploit the popular belief that 'the camera doesn't lie'" (R. 49; Gov't Br. p. 5). The error is two-fold: (1) it attributes to photographic and similar techniques of communication a kind of superveridical magic they do not possess and nobody, not even the Commission, actually believes they possess; and (2) it mixes up the honest and the dishonest use of mock-ups.

To say that the camera doesn't lie is equivalent to saying that the typewriter doesn't lie. The camera is no more than a tool for producing images the character and significance of which depend upon human skill guided by human purpose. A dozen variables, all subject within limits to human control, may be combined in a thousand ways to achieve the ultimate image: film, lens, lighting,

filter, exposure, focus, camera angle, development of the negative, printing of the positive. Which is the combination that "doesn't lie"?

The American public is subject to no illusion about the camera's veracity. It has been raised on King Kong and Superman and is conversant with the blue shirts and make-up worn by political candidates. It can argue the probative value of umpire's call versus camera shot on a disputed play and is not unaware that Audrey Hepburn sings *Eliza* with the voice of Marni Nixon. It owns cameras by the millions, snaps pictures by the billions and awaits the uncertain results with foreknowledge of their unpredictability. "The camera doesn't lie" is not a popular belief, it is a popular quip.

What, then, becomes of the Commission's idea that the communication of a product claim by means of photographs automatically imparts a special authenticity over and above a claim expressed in words—an extra guarantee of truthfulness, a "proof" that is supposedly belied by the undisclosed use of mock-ups? And if the camera is to be cast in the role of an independent witness or "certifier," must there not also be disclosure of every facet of the particular photographic technique employed?

How an image on a television screen can furnish independent "experimental proof" of a claim (Gov't Br. pp. 19-20) defies the imagination. The "revolutionary capability of television" is not "to demonstrate the truth of claim," but to demonstrate a truthful claim more completely and vividly than words alone can do. A picture can show, better than words can tell, just how a cleanser will remove stains. It communicates visually a claim for the product, in that sense it "demonstrates" the claim, but it does not, and by its nature cannot, "prove" or

verify the truthfulness of the claim. The proof lies in the experience of the person who buys and tries the cleanser out.

This whole idea of the Commission that the purpose of mock-ups is to overcome the skepticism of viewers, "to hold out something beyond the sponsor's say-so as proof of the truth of the sponsor's claims" (Gov't Br. p. 11) proceeds from its "fundamental error" of mixing up the honest and the dishonest use of mock-ups. Its basic premise, that there was a false and material representation through the use of a plexiglass model to demonstrate the shaving of sandpaper (Gov't Br. pp. 10-12), never gets extricated from its finding that the claim so demonstrated was not a truthful one. If it had been truthful, then the "doubting Thomas" who was led to exclaim "By golly, it really *can* shave sandpaper" (R. 21; Gov't Br. p. 11) would have found, if he had tried, that it really *could*.

To recapitulate, an advertiser who uses photographs, rather than words alone, to demonstrate a product claim is simply communicating a visual proposition about the advertised product. He represents that the visual proposition, like a verbal one, is truthful, but he does not "add an additional representation" that the visual image, merely because it is a photographic image, vouches for its own truthfulness. His communication is not about the image or how it was made, but *about the product* offered for sale, and its truthfulness or falsity is tested by the experience of the person who buys the product. This situation is not changed in any respect when the advertiser uses a mock-up to communicate a truthful proposition. He has not thereby deceived the consumer or engaged in an unfair or deceptive trade practice.

## III.

**The power sought by the Commission to regulate the non-deceptive use of mock-ups is not requisite to its administration of the Act, the protection of honest competitors or the vindication of the public interest, and it would needlessly interfere with honest and effective advertising.**

The sweeping rule of *per se* illegality of mock-ups for which the Commission is contending would add nothing to its present power to prevent deceptive trade practices. If an advertiser dishonestly employs a mock-up to communicate an untruthful product claim, the Commission already has ample power to issue a cease-and-desist order. If, on the other hand, an advertiser uses a mock-up honestly to communicate an absolutely truthful product claim, does the Commission maintain it would be justified in devoting its not unlimited resources to preventing such a truthful claim from being asserted? And if it did so, in what way would the public interest have been served?

The Commission's theory has an almost metaphysical quality that is divorced from practical considerations as well as logic. The consumer is supposed to be misled although he can verify the complete truthfulness of every proposition by which he was induced to buy. The advertiser may display a painting and say, "This is how my product looks," but if he displays a photograph and makes the same assertion, he is held to have automatically super-added a "proof" of his assertion that materially influences the purchasing decision and would be contradicted by the undisclosed use of a mock-up. This is theorizing minus evidence and expertise.



Nor does the honest use of mock-ups unfairly disadvantage competitors by depriving them of opportunities for providing "real experimental proof" of their claims (Gov't Br. pp. 15-16, 20). (The image on the television screen is not the physical reality and cannot "prove" anything about a product; it can only portray or demonstrate its capabilities. If the demonstration faithfully reflects what the product can do, if the claims advanced are truthful and verifiable by the purchasers—as by hypothesis they are—then all honest competitors are on a parity, whether or not they have found it needful to use mock-ups.

The actual effect of the *per se* rule would be to impose futile restrictions on honest advertisers and advertising agencies and, if anything, to disadvantage the scrupulous ones that would strain to observe the letter of the rule in every jot and tittle. The Commission believes that if a claim cannot be presented without the use of mock-ups, then "the seller may be obligated to forego use of the demonstration form of advertising" (R. 55). In short, advertising effectiveness must yield to academic purism, without regard to any deception of the consumer.

The Commission has suggested, with respect to uncertainties in the application of its third final order, that the respondents may come to it for "definitive advice, in advance, as to whether proposed conduct would meet the requirements of the order" (Gov't Br. p. 23). Apart from questions as to the availability of the Commission to give prompt attention to such requests for advice, or the ability of the staff to act for the Commission, the procedure covers only persons who are subject to an order and could not help in resolving the uncertainties that would result for the advertising industry as a whole from the approval of the Commission's theory. Even if such a

procedure were established, resort to it would be impracticable in view of the conditions under which advertisements are produced. The barest sketch of the steps involved in making a television commercial indicates the complexity of the process and the importance of the time factor.

The advertiser and the advertising agency first establish a calendar deadline and determine the length and type of use of the commercial. The agency immediately undertakes to purchase suitable time spots and begins to develop rough ideas for copy and art. These culminate after a period of weeks in a "storyboard"—a series of sketches showing how the finished commercial will appear on the screen,—together with accompanying script. The storyboard is submitted for approval to the advertiser and perhaps to the network clearance departments and the Code Office of the National Association of Broadcasters. Composition of music, hiring of musicians, recording of the music and of off-camera sound effects, may be going on at the same time.

At this stage, if all approvals have been obtained, bids are sought from film producers, a studio is selected and a shooting date fixed. The agency must audition performers and perhaps negotiate a lengthy talent contract with a star. After filming, the negative goes to a laboratory for processing, animated sequences and optical effects may be added, and the sound-tracks are mixed and re-recorded on the film. The composite "work print" is submitted for final approval to the advertiser and in some cases to the networks. Prints are then made and shipped to the stations and networks on which time has been purchased.

The entire procedure requires two months for a "rush job" and up to six months for an animated commercial.

The release date of the commercial is often critical. It may be timed for a seasonal demand, for a particular holiday, to tie in with a public event like the Olympic Games, or to accompany an over-all promotional campaign of the advertiser. In these cases delay past the deadline would destroy the commercial's value.

In 1963 advertising agencies produced 52,000 commercials, of which 40,000 were filmed and the rest were live or taped.\* They produced a much greater number of print advertisements, to which similar considerations apply, though in lesser degree. The establishment by the Commission of some kind of prior review procedure to sort out the incidental from the material use of mock-ups would obviously fail to meet the needs of the industry, even if it could be otherwise justified.

The impact of the Commission's *per se* rule on advertisers and advertising agencies having a legitimate need for mock-ups must, then, be adverse. The Court has held that it will not sanction a *per se* rule of illegality lacking adequate knowledge of the "economic and business stuff" out of which the challenged arrangements emerge. *White Motor Co. v. United States*, 372 U. S. 253, 263 (1963). The instant appeal, which has been brought by the Commission to test a hypothetical assumption and comes up on a record lacking any evidence as to the industry's need for legitimate mock-ups, would appear to call for similar restraint.

---

\* Figures obtained from Film Producers Association and the Television Bureau of Advertising.

## CONCLUSION

**The judgment of the Court of Appeals should be affirmed.**

Respectfully submitted,

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**November 1964**

No. 62.

Office-Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1964

**FEDERAL TRADE COMMISSION,**  
*Petitioner,*

*v.*

**COLGATE-PALMOLIVE COMPANY and  
TED BATES & COMPANY, INC.,**  
*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT.**

**BRIEF FOR RESPONDENT COLGATE-PALMOLIVE  
COMPANY.**

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November 3, 1964.

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No. 62.

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1964

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FEDERAL TRADE COMMISSION,

Petitioner,

v.

COLGATE-PALMOLIVE COMPANY and

TED BATES & COMPANY, INC.,

Respondents.

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**BRIEF FOR RESPONDENT COLGATE-  
PALMOLIVE COMPANY.**

**Opinions Below and Jurisdiction.**

References to the opinions below and to the basis for jurisdiction of this Court are contained in the brief of Petitioner, the Federal Trade Commission (hereinafter the "Commission").\*

**Questions Presented.**

(1) Whether a television advertisement communicating a completely truthful claim as to the quality or merits of a product is illegal under the Federal Trade Commission Act solely because of the undisclosed use of a mock-up or prop.

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\* As to jurisdiction, however, see the second "Question Presented", *infra*, and Point IV hereof.

(2) Whether the instant writ is timely in view of the manner in which the Commission has disregarded the jurisdictional limitations imposed by Congress under the Federal Trade Commission Act and the Judicial Code.

### **Statutes Involved.**

#### **The Federal Trade Commission Act.**

The Commission's brief sets forth portions of Sections 5(a)(1) and 5(a)(6) of the Act which bear upon the first question presented to this Court.

The following provisions of the Act are relevant to the second question presented to this Court:

Section 5(c) of the Act defines the powers of courts of appeals in reviewing cease and desist orders of the Commission and states in relevant part that a court of appeals

"... shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission. . . .

"The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28" (15 U. S. C. §45(c)).\*

Section 5(i) of the Act defines the procedure to be followed by the Commission in the event that a judgment and decree of a court of appeals, which sets aside or modifies an FTC cease and desist order, has become "final" under Section 5(c). It provides:

\* Section 5(d) of the Act provides that

"Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive" (15 U. S. C. § 45(d)).



"If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected" (15 U. S. C. §45(i)).

### **The Judicial Code.**

Section 2101 of the Judicial Code, also relevant to the second question presented, provides in part:

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days" (28 U. S. C. §2101(c)).

### **Statement.**

This proceeding stems out of the use, in 1959, of three television advertisements of Palmolive Rapid Shave, a product of Colgate-Palmolive Company (hereinafter "Colgate"). The advertisements portrayed, among other things, the shaving of the human beard and the shaving of sandpaper after the application of Palmolive Rapid Shave. The

advertisements used a plastic "mock-up" as a substitute for sandpaper; it is undisputed that sandpaper does not properly reproduce on television.\*

The complaint of the Commission charged that Colgate and its advertising agency, Respondent Ted Bates & Company, Inc. (hereinafter "Bates"), had violated Section 5 of the Act in the portrayal of the shaving of sandpaper. No charge was brought with respect to those portions of the advertisements which portrayed the shaving of the human beard after the application of Palmolive Rapid Shave.

The Hearing Examiner dismissed the complaint after hearing.

### **The First Order and Opinion of the Commission.**

On December 29, 1961, the Commission reversed the ruling of its Hearing Examiner. It held (1) the particular grade of sandpaper as seen by viewers could not be shaved as easily and quickly as the advertisements indicated (a holding which the Court below upheld in its first opinion and which Colgate and Bates have not thereafter challenged) and (2) even if sandpaper could be shaved precisely as shown in the advertisements and despite the fact that sandpaper does not properly reproduce on television, the use of a mock-up for sandpaper was itself an independent illegal practice violative of the Act (R. 9 ff.).

It is the ruling of the Commission on this second point which is the sole substantive issue before this Court. From the time of its first opinion through two thorough reviews by the Court of Appeals for the First Circuit and in its

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\* The Court below stated:

"As the examiner found on undisputed testimony here, the shaving of sandpaper, even when in fact accomplished, does not properly reproduce on television and must be simulated to be effective" (R. 39).

brief to this Court, the Commission has persistently asserted that a material deception occurs if an undisclosed mock-up is used in a completely accurate portrayal of a test, experiment or demonstration.

This position of the Commission has been twice presented to, thoroughly considered, and rejected by the Court below.

### **The November 20, 1962 Mandate of the First Circuit.**

In its first review, the Court found that respondents' "only offense was the making of a single misrepresentation about a single product", i.e., exaggeration of the facility with which sandpaper could be shaved after the application of Palmolive Rapid Shave (R. 42). The Court observed that the case was "trivial" and suggested that "little injury was done to the public by respondents' representations" (R. 68).

As to the issue before this Court, the Court below rejected all of the arguments put forward by the Commission to justify its ruling that a truthful mock-up\* was materially deceptive. The Court stated:

"But we are unable to see how a viewer is misled in any material particular if the only untruth is one the sole purpose of which is to compensate for deficiencies in the photographic process. The Commission has put the shoe on the wrong foot. What the viewers are interested in, and moved by, is what they see not by the means" (R. 40).

"But where the only untruth is that the substance he sees on the screen is artificial, and the visual appear-

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\* For purposes of brevity, the phrase "truthful mock-up" is used throughout this brief to designate the issue in the first Question Presented.

ance is otherwise a correct and accurate representation of the product itself, he is not injured. The viewer is not buying the particular substance he sees in the studio; he is buying the product. By hypothesis, when he receives the product it will be exactly as he understood it would be. There has been no material deceit" (R. 41-42).

The Court, in ruling that the Commission was in "fundamental error" on the truthful mock-up question (R. 42), left no room for distinctions between experiments, tests, demonstrations, illustrations, portrayals, etc. Instead, as its quoted language shows, the Court saw no illegality of any kind in the use of a mock-up where the claims made by the advertiser for the product were in fact true in every respect. The Court then set the Commission's order aside, warning that it had "undercut" the basis of an order against mock-ups as such (R. 42) and directing that a new order be prepared by the Commission "in accordance with this opinion" (R. 43).

#### **The Commission's Disagreement with the November 20, 1962 Mandate of the First Circuit.**

The Commission did not move for a rehearing before the First Circuit regarding that Court's November 20, 1962 decision and decree, nor did it seek review by certiorari to this Court.

Instead, the Commission, without further briefs or oral argument, issued on the same record a second opinion and a proposed final order under date of February 18, 1963 (R. 44 ff.). In its second opinion, the Commission stubbornly held to its position that a truthful mock-up was illegal if used to portray anything other than an "incidental" aspect of an advertisement (R. 51).

The November 20, 1962 mandate of the First Circuit had not ordered or invited a restatement of position by the Commission. Nevertheless, the Commission did so, in part on the stated ground that its first "opinion failed to spell out sufficiently the theory of law on which the order was based ..." (R. 48).

Exceptions to the Commission's second opinion and proposed order were filed by Colgate and Bates on April 15, 1963.\*

In response to these exceptions, the Commission issued a third opinion and order on May 7, 1963. Once again, the Commission reiterated its assertion that a truthful mock-up when used in a "demonstration" violated the Act (R. 93 ff.).

The Commission's third order (which is the order before this Court) prohibited Colgate, *inter alia*, from:

"Unfairly or deceptively advertising any such product by presenting a test, experiment or demonstration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sale, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop instead of the product, article or substance represented to be used therein" (R. 93-94).\*\*

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\* In its exceptions, Colgate argued, *inter alia*, that the Commission's latest action did not conform to the mandate of the Court of Appeals, which the Commission had not sought to modify or reverse by seeking judicial rehearing or certiorari (R. 61 ff.). Colgate also urged that the Commission's restatement of its already-rejected position on the mock-up issue disregarded the governing limitations set forth in Section 5(i) of the Federal Trade Commission Act (R. 63 ff.).

\*\* The order thus applies to all advertising and is not restricted to television.

Thereafter, Colgate filed with the Commission on June 6, 1963 a motion to correct its third order, which motion the Commission denied on the ground that the motion was based upon "the mistaken premise that the Commission's final order is in conflict with the prior decision and mandate of the Court of Appeals for the First Circuit" (R. 119).

Colgate also filed on June 6, 1963 with the Court of Appeals for the First Circuit a petition seeking to correct, review and set aside the third order of the Commission (R. 99).

### **The December 17, 1963 Decision of the First Circuit.**

The second review by the Court below, based on full briefing and oral argument, resulted in the December 17, 1963 opinion and decree which the Commission challenges before this Court. In its opinion, the Court of Appeals noted that the Court of Appeals for the Fifth Circuit had, in the interim, agreed with it that truthful mock-ups were not, *per se*, violative of law (R. 131).\*

The Court of Appeals declared that the Commission was not legally free to ignore its earlier decision on review, citing Section 5(i) of the Act (R. 132):

"Prior to the issuance of its new order in final form the Commission handed down a fifteen-page opinion hereinafter the 'second opinion,' in which it recited that our 'various suggestions' 'in substantial part have been accepted.' We reached a number of conclusions not labelled suggestions which the

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\* The Commission's brief neglects to inform this Court that in *Carter Products, Inc. v. Federal Trade Commission*, the Fifth Circuit stated of the first decision of the Court below:

"[W]e consider the standards worked out in that opinion well reasoned, in keeping with the principles established in non-television cases, and applicable to the case now before us." (323 F. 2d 523, 528 (5th Cir. 1963))



Commission was not free to disregard under the mandate. 15 U. S. C. A. §45(i); . . ." (R. 132).\*

Commenting on whether the Commission had complied with the requirements of Section 5(i), the Court quoted the following description of the Commission's reaction to the Court's earlier mandate: "The Commission has not capitulated, but has merely withdrawn to regroup its forces" (R. 132).\*\* The Court also stated, "The Commission's response is that if it has departed from our opinion, it is because we misunderstood its original intention, due in large measure to 'extreme arguments' made by its counsel" (R. 132).

Nevertheless, in view of "the Commission's antipathy to mock-ups", the Court agreed to "make an exception and re-examine [the Commission's] present position on the merits rather than from the limited standpoint of whether it comports with our previous opinion" (R. 133).

After such consideration, the Court fully confirmed its holding on the first review that a truthful mock-up does not violate the Act:

"We are considering no basic deception, but only the situation where, in illustrating faithfully a test which has been actually performed, an advertiser uses some foreign mock-up or makeup. As we stated in our previous opinion, so far as deceit is concerned, the buyer is interested in what he thinks he sees, and if what he buys can do and has done exactly what he thinks he sees it do, he has not been misled to any substantial degree" (R. 136).

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\* Section 5(i) requires that after the court of appeals has issued a judgment or decree modifying or setting aside an order of the Commission, all further administrative action must be pointed to the preparation of a new order "rendered in accordance with the mandate of the court of appeals."

\*\* The observation was made in 38 Notre Dame Law. 350, 354 (1963). Various law review comments on this case are cited in the petition for certiorari, p. 8, n. 3.

"If there is an accurate portrayal of the product's attributes or performance, there is no deceit" (R. 138).

In arriving at this conclusion the Court carefully examined the Commission's view that there is a vital distinction between a truthful mock-up in an advertisement which "proves" visually in a "demonstration" a quality of the product (held to be illegal by the Commission) and a truthful mock-up in an advertisement which "portrays" or "illustrates" a quality of the product (held to be legal by the Commission) (R. 133-38). The Court noted that this attempted distinction was emphasized at oral argument when counsel for the Commission stated that an ice cream manufacturer could legitimately use a delicious-looking mock-up for his ice cream since a portrayal of such a mock-up would not constitute visual "proof" (R. 134).

The Court's reanalysis, which again rejected the Commission's position, was:

1. There is no logical difference between the delicious-looking ice cream example and a mock-up deemed illegal by the Commission. The ice cream portrayal can just as logically be deemed an attempt to "prove" a quality or appearance of the product (R. 135) and can just as logically make an implied representation that the ice cream is real (R. 137-38). Indeed, it would be paradoxical to hold that a mock-up of the product itself was legal while a truthful mock-up of an incidental substance—e.g., sandpaper in a shaving cream advertisement—would violate the Act (R. 138).

2. The Court found that, as a result of the Commission's illogic, there was great practical difficulty in trying to make distinctions between a "test" and an "illustra-

tion" and between "proof" and "non-proof". It considered examples such as blue bedsheets (appearing white on television) being removed from a washing machine, adults and children swallowing delicious medicines, etc. (R. 135-36) and also noted that the Commission had not discussed in its second and third opinions similar difficulties which the Court had laid bare in its first opinion.\* Citing the decision of this Court in *Federal Trade Commission v. Henry Broch & Co.*, 368 U. S. 360, the Court of Appeals found that the order was incapable of practical interpretation (R. 136). This finding, it stated, stemmed from a more fundamental flaw: the Court could perceive "no substantial logical difference between what the Commission disapproves of and what it accepts" (R. 135).

3. The Court repeated the views expressed in its November 20, 1962 decision that the Commission's attack on truthful mock-ups had lost sight of the issue framed by the Commission itself. By hypothesis, the mock-up perfectly represents reality. The Commission once again tended to overlook this and "in speaking of the buyer's 'disillusionment,' proceeds as if he would learn of the mock-up, but would not learn that no quality or characteristic of the product had been misrepresented" (R. 137).

4. The Court exposed the fallacy in the Commission's proposition that a test should be "genuine" because it gives to the viewer proof going beyond the advertiser's "word" alone. The Court took judicial notice that television com-

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\* Two examples specifically mentioned by the Court were (1) the legality of a mock-up used in place of a testimonial which had been actually received (R. 137); and (2) use by an advertiser of a genuine article he knows television reproduction will substantially upgrade (R. 138).

mercials are normally pre-recorded. A pre-recorded test did not disturb the Commission; yet by the use of pre-recording there was only the advertiser's "word" that the test could always be carried out and that the particular instance in which it was recorded was not a rare exception. The Court ruled that there was little difference between taking the advertiser's word that the depicted test could always be carried out and taking his word that the depicted test was in other respects a faithful reproduction of an actual test (R. 137).

5. The Court therefore confirmed its original holding that the Commission's self-styled "theory of law" (R. 48) was irrational. The "theory" created the wrong implication. Instead, the fundamental and practical representation to be implied under the statute is that no inaccuracy has been introduced into the picture by the "photographic process" (R. 138). This, said the Court, would be a principle capable of universal application and would include all demonstrations of any kind (*Ibid.*). It would also provide a valid basis for judging the legality of other examples which the Court had mentioned in its first opinion and which the Commission had failed thereafter to discuss. Succinctly put, the principle would be: "If there is an accurate portrayal of the product's attributes or performance, there is no deceit" (*Ibid.*).

6. Having reaffirmed its November 20, 1962 mandate, the Court decided that the third order of the Commission suffered from the same flaw as the first in that the basic criterion of legality announced by the Court had no special relationship to mock-ups. For that reason it declined to amend the Commission's third order (R. 139). "Accordingly," said the Court, "we instruct the Commission as

we thought we had directed it before, to enter an order confined to the facts of this case, where respondents used a mock-up to demonstrate something which in fact could not be accomplished"\* (R. 139). As in its first decree, the Court's confirming mandate left to the Commission the framing of the detailed terms of an order within the limits set by the Court's opinion.

The Commission thereupon filed for the first time a petition for a writ of certiorari on April 15, 1964, which writ was granted on May 25, 1964. The writ is not addressed to the issue of whether the Commission's third order was rendered in accordance with the Court's November 20, 1962 mandate. Instead, it seeks a review of the validity of the underlying theory of law which has been found to be illogical by the Courts of Appeals for the First and Fifth Circuits.

## SUMMARY OF ARGUMENT.

### I.

In attempting to determine whether a television advertisement is materially deceptive under the Federal Trade Commission Act, the Federal Trade Commission has erroneously and illogically looked to the physical nature of the object before the camera, rather than the image which is projected electronically upon the television tube and seen by viewers. As the Court below held after two thorough

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\* The Commission's brief claims that the portion of the Commission's order addressed to this aspect of the advertisements was sustained by the Court below (p. 6). This claim is incorrect. In its second review, the Court of Appeals declined to "comment on the precise terms of an order *in vacuo*." It held that "the Commission has been preoccupied with its broad opposition to mock-ups and has never expressed its views with respect to the proper scope of an order directed to more narrowly conceived substantive misconduct," and again remanded to the Commission for still another order. (R. 139-40).

reviews of the Commission's position, "What the viewers are interested in, and moved by, is what they see, \* \* \*". Where an advertiser "in illustrating faithfully a test which has actually been performed" uses a prop or mock-up, and "there is an accurate portrayal of the product's attributes or performance, there is no-deceit".

The Commission attempts to avoid the inescapable logic in the holding below by putting forward a self-described "theory of law" that the advertiser who uses a mock-up makes an implied representation that he is using the real object, and is thereby guilty of a material misrepresentation. The Court below was correct in ruling that the only representations made are that the claims concerning the product are true and that a demonstration showing this can in actuality be performed exactly as depicted. In any event, even if the implied representation existed, it would be immaterial since it has no meaning for, or interest to, the consumer.

In addition, the Commission has presented no factual proof to substantiate its position that the consumer is deceived by the use of a truthful mock-up. It relies entirely on its own *ipse dixit* for this thesis, despite the fact that its current position represents a complete about-face from its previous stand on this matter.

## II.

Because of the basic illogic in the Commission's position, it has been driven into adopting an untenable distinction between mock-ups which "merely . . . portray a sponsor's product or illustrate its use," and those which "purport to prove" a product's quality or use. The Commission espouses the former while condemning the latter. As the Court below pointed out, there is no rational dividing line between the two. The result is an order of the Commission



which is ambiguous and incapable of practical construction because of the basic flaw in the Commission's theory of illegality.

### III.

The Commission's argument that the Court below exceeded its powers of judicial review is entirely without merit. The Commission concedes that its order is based upon a "theory of law". The proper interpretation of the Federal Trade Commission Act is ultimately a task for the judiciary. The Court of Appeals, in two careful reviews, did not base its decisions merely upon patent difficulties in administrative application of the Commission's order, or on a weighing of interests. While the Court below used various hypothetical examples to illustrate the difficulties and the irrationality in the Commission's own hypothetical position, its basic purpose was to show that the Commission's theory was not consonant with the Act.

### IV.

In any event, the issue to which the instant writ of certiorari is addressed was not timely brought to this Court. Under both the Federal Trade Commission Act and the Judicial Code, the decree of the First Circuit entered on November 20, 1962 was final. Having ignored the mandate in that decree and having entered a new order in defiance thereof, the Commission may not now obtain review on the issue simply because by its actions it has compelled the Court of Appeals to enter a second confirming mandate on the issue identical to the decree of November 20, 1962.

## I.

**The use of a mock-up in order to portray accurately the attributes of a product is not deceptive.**

**A. The Visual Result Is the Only Rational Criterion for Judging the Truth of Television Advertising.**

The Court below, twice reversing the Commission, has held that the use of a mock-up does not result in deceit where the advertisement, as seen by the viewer, is perfectly accurate.\* The Court ruled:

“What the viewers are interested in, and moved by, is what they see, not by the means.” (R. 40); and

“We are considering no basic deception, but only the situation where, in illustrating faithfully a test which has been actually performed, an advertiser uses some foreign mock-up or makeup. As we stated in our previous opinion, so far as deceit is concerned the buyer is interested in what he thinks he sees, and if what he buys can do and has done exactly what he thinks he sees it do, he has not been misled to any substantial degree.” (R. 136); and

“If there is an accurate portrayal of the product’s attributes or performance, there is no deceit” (R. 138).

The buyer, the Court held, is not interested in the photogenic properties of a product. What he is interested in is whether the actual product he buys will look and perform the way it appeared on his television set.

This is the simple proposition upon which this case rests. Its validity has been demonstrated, inadvertently, by the Commission itself.

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\* As noted, the Court of Appeals for the Fifth Circuit—the only other Court which has considered the issue—reached the same conclusion. *Carter Products, Inc. v. Federal Trade Commission*, 323 F.2d 523 (5th Cir. 1963).

In its first opinion the Commission found that the "clinching argument made by the commercials"—that which persuaded viewers to buy the product—was "‘By golly, it really *can* shave sandpaper’" (R. 21) (emphasis in original). Both the Commission's second opinion and brief to this Court quote this very finding of the Commission (R. 50, Gov. Br. 11). Yet "By golly, it really *can* shave sandpaper" pertains solely to the substantive claim of the advertising and has nothing to do with the use or non-use of a mock-up. The Commission thus in this instance recognized that a buyer's real concern is with the truth of the substantive claims or promises made to him, not with the means used to make them. Since, under the hypothesis adopted by the Commission to create the sole issue before this Court, Palmolive Rapid Shave has the very effects on sandpaper which the advertisements claimed for it, it follows that no deceit occurred from the mere use of a mock-up in the instant advertising—or would occur from the many hypothetical examples considered in the record.

The other side of the coin is equally simple. If deceit in a television commercial depends on what the viewer sees rather than on the means by which an image is projected, an advertiser *would* be deceptive if he knowingly put before the camera a genuine object whose qualities would be substantially upgraded by the photographic process. The Court below made exactly this observation in its first opinion (R. 41). Since that time, the Commission rendered two more opinions, submitted a brief to the Court below and submitted a certiorari petition and a brief to this Court. Yet it has nowhere discussed the point.\* It is apparent that the reasoning by which the Commission created the instant issue would fall of its own weight as soon as the Commission

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\* In its second review, the Court of Appeals noted that the Commission had not seen fit to discuss this question (R. 138, n. 16).

faced up to the implications of such a situation; the Commission would be forced to recognize that the key question in determining the meaning and legality of television advertising is what the viewer sees, not the genuineness of the object in front of the camera.

Indeed, any other view would be inconsistent with the basic teaching that an advertisement is to be judged on the basis of the overall impression it conveys to the viewer. Advertisements are to be read in the light of "the ultimate impression upon the mind of the reader," and "considered in their entirety, and as they would be read by those to whom they appeal." They "are intended not 'to be carefully dissected with a dictionary at hand, but rather to produce an impression upon' prospective purchasers," *Aronberg v. Federal Trade Commission*, 132 F. 2d 165, 167 (7th Cir. 1943). See *Federal Trade Commission v. Sterling Drug Inc.*, 317 F. 2d 669, 674 (2d Cir. 1963); *Elliot Knitwear, Inc. v. Federal Trade Commission*, 266 F. 2d 787, 789 (2d Cir. 1959).

Moreover, this principle is the only one which makes sense in television cases. The Commission's discourse upon real "proof" (R: 49-52) is contradicted by the nature of the medium. The whole process of television reproduction is based upon an *impression* that a single, unified and continuous picture is being seen, when in fact the television camera and transmitter send to the television receiver a multitude of separate tiny picture elements which are placed before the human eye (Walker (ed.), *National Association of Broadcasters, Engineering Handbook*, 5th ed. McGraw-Hill (1960) at pp. 5-3 to 5-5). This is accomplished by a complex, and necessarily "adjusted", system of transmission which, in a line-scanning process, puts 30 complete image frames per second upon the picture tube face; it is because of human "persistence of vision" that complete

images are seen and continuity of action portrayed (*Id.* at pp. 5-4 to 5-8; 4-140; 4-153 to 4-156). In the light of the physics of television it is naive to concentrate upon the object in front of the camera; what matters is what a viewer "sees" on the face of his television set.

If the Commission were correct in this case, its logic would lead it to bar all television advertising which is not accompanied by a lecture explaining how television works.

It is submitted that the only rational criterion for judging television advertising against the terms of Section 5 of the Act is whether truth is conveyed to the viewer, *i.e.*, whether the product will actually do what the viewer has seen it do on his television screen.

**B. An Accurate Test, Experiment or Demonstration Using a Truthful Mock-up Makes no Misrepresentation.**

The Commission's brief is based on the assertion that Colgate made a "deliberately false representation" that no mock-up was employed and that "this representation was material in the sense that it furnished an important inducement to the buyer" (Gov. Br. 9, 11-12).

This argument was made and rejected below. As the Court of Appeals put it:

"The Commission's real objection, of course, is not to the resort to a mock-up, but to the implied representation that none is employed. This is apparent not only from the cases it regards apposite, which involve positive affirmations, such as that the manufacturer had (contrary to fact) received an award, or testimonials, or orders from certain customers, but also specifically from its conclusion that respondents' advertisement would be no worse, 'only more explicit' if the announcer had affirmatively stated, 'This is real sandpaper' " (R. 137).

The Court rejected the Commission's argument:

"If there is an accurate portrayal of the product's attributes or performance, there is no deceit" (R. 138).

It is submitted that this ruling of the Court of Appeals is sound and that the Commission's view is, as the Court put it, "short on analysis" (R. 138).

The Court made clear that the Commission's error was to confuse the substantive claim made for a product with the means by which such claim was conveyed:

"In seeking to stress the extent of misrepresentation by mock-up the Commission sometimes loses sight of the difference between a mock-up which presents an accurate portrayal and one . . . that effects a basic deception" (R. 137).

Such confusion is inexcusable. Under the Commission's own hypothesis, Colgate's representations were that (1) sandpaper could be shaved in a certain way after the application of Palmolive Rapid Shave; and (2) a demonstration could be performed showing that Palmolive Rapid Shave could do exactly this. Again under the Commission's own hypothesis, both representations are true.

The Commission claims that an additional representation was made, namely, that the demonstration in the advertisements was then and there being performed without the use of a mock-up. Such a representation was not made explicitly—and the Commission in effect admits as much (R. 60, n. 12).

The Commission's assertion is thus that under its "theory of law" a representation is to be *implied* that no mock-up was used.



It is submitted, rather, than no such representation is to be implied or, in any case, that any such implied representation would be immaterial.\*

The Court of Appeals made clear why no implied representation should be imported into the case through the Commission's legal theory. The Court held there was no more reason for implying a representation that no mock-up was used in a test or experiment situation than there was in any other kind of television advertisement (R. 137-38).

Indeed, the Court reduced the Commission's theory to the absurd. The Commission argued that whereas a purchaser of ice cream "would be indifferent to the use of [a] mock-up" (R. 134), a purchaser of shaving cream would be "morally disillusioned" if he learned that a mock-up had been used for sandpaper (R. 134). The Court pointed out that the Commission's ratiocination had thus led the Commission to the paradox of approving a mock-up of the product itself in the case of ice cream while condemning a situation where a manufacturer of shaving cream used a mock-up for an entirely collateral substance, sandpaper (R. 138). The Court concluded:

"Yet we cannot see why if the representation is to be implied in one instance it is not in the other" (R. 138).

This was simple logic. The Commission's attempt to distinguish a "portrayal" or "illustration" on the one hand from "visual proof" on the other made no sense. On television (or in a printed advertisement, for that matter) how can a visual "portrayal" of a claim be any different from "visual proof" of a claim? In both cases, something pictorial is shown to a viewer. In both cases the advertiser makes a claim as to a quality of the product

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\* The Commission concedes that only a "material" misrepresentation violates the Act (R. 52, n. 2).

advertised. In neither case is there a basis for implying an additional representation that the "genuine" is being photographed.

Rejecting the attempted distinction in "materiality" generally, the Court found that in either case—sandpaper or ice cream—"the buyer is interested in what he thinks he sees, and if what he buys can do and has done exactly what he thinks he sees it do, he has not been misled to any substantial degree" (R. 136).<sup>\*</sup> Applying this reasoning, if after the application of Palmolive Rapid Shave real sandpaper could in fact be shaved precisely as claimed, the consumer would be no less indifferent to the use of the prop than the purchaser of the ice cream so long as both products actually looked and functioned as they had on television.<sup>\*\*</sup>

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<sup>\*</sup> This general proposition cuts across the arguments made at pp. 20-1 of the Commission's brief. A buyer relies upon the claims made for the product and, by hypothesis, those claims are true. Thus, purchasers are not misled and all sellers compete on the same ground: basic truthfulness.

<sup>\*\*</sup> The Commission's brief relies heavily upon *Federal Trade Commission v. Standard Education Soc.*, 302 U. S. 112, and *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, asserting that the doctrine of those cases disposes of the present issue. Those cases hold, as do the cases cited in footnote 3 of the Commission's brief (p. 14), that the product must have the quality or attribute, however "extrinsic", which is explicitly held out as a material inducement to the consumer to buy. Contrary to the implication of the Commission's brief, the Court below did not disregard this settled doctrine. Rather, it applied the rule to every aspect of the facts in this case. In its first opinion, the Court expressly held, "If a misrepresentation is calculated to affect a buyer's judgment it does not make a fair business practice to say the judgment was capricious. *Mohawk Refining Corp. v. F. T. C.*, 3rd Cir., 1959, 263 F. 2d 818, cert. den. 361 U. S. 814; *C. Howard Hunt Pen Co. v. F. T. C.*, 3rd Cir. 1952, 197 F. 2d 273" (R. 38). By this holding it upheld Commission findings directed at that portion of the advertising not before this Court. It also held, however, in respect to the Commission's mock-up theory, that the Commission had failed to show that any representation actually affecting a buyer's judgment had been made. If the Court of Appeals was wrong, this cannot be demonstrated simply by pointing to the legal standard which the Court faithfully applied.

The Commission's error is pointed up by the Court of Appeals' discussion of pre-recording. As noted in the Statement, the Court made clear that a pre-recorded "test" gave only the advertiser's "word" that the test could always be carried out; yet the Commission did not attack pre-recorded tests as materially deceptive for failing to disclose the fact of pre-recording (R. 137). The Court concluded: "We see little difference between this and taking his word that the test depicted is a faithful reproduction in other respects" (R. 137).

In brief, the Court scrutinized the Commission's "theory of law" by which an "implied" representation was injected into this case and found that the theory was divorced from reality and tangibly inconsistent. It is submitted that the Court was eminently correct.

### **C. The Commission's Position Is Unprecedented and Is Without Support.**

The utter lack of support for the Commission's position is underscored by its failure to produce any evidence relating to the issue before this Court. Admittedly, the Commission is not required to adduce evidence of deceptive effects in every case. But surely some effort in that direction is appropriate in what the petition for certiorari proclaimed to be "a test case of major importance . . ." (p. 8).\*

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\* Certainly the Commission's conduct here is at variance with its conduct in the two cases upon which it chiefly relies. In *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, involving a specific branding practice in one section of a single industry, the Commission conducted an "elaborate inquiry" in which it gained a "wealth of information" (291 U. S. at 75). Similarly, in *Federal Trade Commission v. Standard Education Soc.*, 302 U. S. 112, the Commission relied upon the testimony of witnesses from "ten states—teachers, doctors, college professors, club women, business men" (302 U. S. at 117).

The lack of evidentiary support here is all the more remarkable because the Commission's position represents a sharp break with its earlier publicly-announced policy. The Court of Appeals for the Fifth Circuit stated in the *Carter* case of the Commission's new position, "It was not always thus" and cited a public statement of the Commission's former Chairman Kintner made late in the same year as the Palmolive Rapid Shave advertisements were shown:

"We realize that it is often difficult to impart true life quality to a product when it is photographed for television. . . .

"Where the use of props does not result in a material deception, the Federal Trade Commission would have no reason to complain. . . .

"Obviously, we recognize that it is impossible to photograph ice cream properly under hot lights. If you have to use shaving cream to get the kind of head which is normal on a glass of beer, this probably would not represent a material deception, unless, of course, it was carried beyond a reasonable point. If a glass goblet glistens too much, we still aren't likely to be alarmed" (323 F. 2d at 529, n. 10, citing Advertising Age, Vol. 30 No. 47, p. 1, November 23, 1959).

In that same month, there was published a report of a meeting of the Chairman and staff members of the Commission with officers of the Association of National Advertisers, Inc. Noting that it had been reviewed by Chairman Kintner prior to its publication, the report states:

"F. T. C. recognizes a rule of reason. . . . A theatrical artifice, to be condemned by the Commission, must represent a material deception as to the characteristics, performance or appearance of a product. . . . In general, F. T. C. is not concerned with what goes on in the act of bringing a TV picture

to the screen—rather they are concerned with what the viewer sees” (Special Report to A. N. A. Members, “A. N. A. Officers Meet With FTC to Seek Standards for TV Visual Presentation”, November 24, 1959, p. 2).

The hasty change in policy had foreseeable clumsy consequences. In addition to the irrationality in concept exposed by the Court of Appeals, the new doctrine has already become irrational in application. The *Carter* case, *supra*, involved a demonstration where a mock-up of shaving cream was used in a shaving cream advertisement—and without any claim that there was a photographic need to use a mock-up. The Commission’s brief in the *Carter* case argued to the Fifth Circuit that Carter’s offense was greater than Colgate’s (p. 27). Not only was there no photographic need, but *Carter* involved disparagement of other shaving creams, whereas Colgate “was not in the business of selling sandpaper, and did not in any way compete with those who do.” As a result, there was, argued the Commission’s brief, a “manifest—indeed, critical—dichotomy” between the two (*Ibid.*). Yet, after remand from the Fifth Circuit rejecting the Commission’s views on mock-ups, the Commission did not seek certiorari from this Court, but instead issued a modified order which does not prohibit truthful mock-ups (*Carter Products, Inc.*, Dkt. 7943 issued Dec. 6, 1963 and released Dec. 27, 1963).

It would seem clear that a policy reversal so deficient in logic, so lacking in evidentiary support, so abruptly reached and so irrationally enforced reveals an underlying confusion which the Court of Appeals properly struck down.

## II.

**The order of the Commission is patently ambiguous because the Commission's "theory of law" is illogical and inconsistent.**

The order prohibits any "test, experiment or demonstration" which "is represented to the public as actual proof of a claim made for [a] product", and which utilizes an undisclosed prop or mock-up. In the Commission's exegesis, a truthful mock-up in an advertisement is illegal if "visual proof" is offered but proper if a product claim is illustrated or portrayed (R. 133, n. 6, 134). Thus, the line between the legal and illegal at the risk of penalties of \$5,000 a day for each violation\* is totally blurred.

As the Court below recognized, this ambiguity derives primarily from the "great difficulty" which must necessarily attend an effort to outlaw some mock-ups and to permit others (R. 135).\*\* The problem is one of basic legality; as the Court below stated, it stems from the fact that "we find no substantial logical difference between what the Commission disapproves of and what it accepts" (R. 135).

The confusion in the order was demonstrated by the examples discussed by the Court. Thus, the Court could not agree that there was any practical difference between visual proof and illustration of a claim (R. 135). It saw no distinction between the delicious-seeming ice cream example and a mock-up of sandpaper (R. 135, 138). The Court found similar difficulties applying the order to other mock-

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\* 15 U. S. C. § 45(1).

\*\* The Court below stated that "we envisage great difficulty in determining any dividing line between what is and what is not a test or experiment. . . ." (R. 135)



ups like the "bedsheet" and "Lipsom's Tea" examples (R. 135, 136).<sup>\*</sup> These problem-prone examples were not, the Court concluded, "the product of a fertile imagination, but . . . the result of ephemeral examination of current TV commercials" (R. 136).

In rejecting the practicability as well as the logic of these distinctions, the Court below cited *Federal Trade Commission v. Henry Broch & Co.*, 368 U. S. 360, 367-68, in which this Court made clear:

"The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application."<sup>\*\*</sup>

It is submitted that the Commission's order fails to meet the *Broch* standard. It is also submitted that the ambiguities in the order cannot be cured by verbal changes. The "great difficulty" found by the Court of Appeals is rooted in the Commission's basic legal theory. Only when that theory is set aside can a proper order be formulated.

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<sup>\*</sup> The bedsheet example involved use of a blue bedsheet which photographed as white in connection with a soap advertisement (R. 135). With respect to this example, the opinion of the Court below demonstrated the following obvious ambiguities in the order: Does such a depiction merely "display or illustrate a claim," or does it imply a test? If a test is implied, is the depiction proof of a claim by means of "an experiment before the eyes of the viewer"? If the sheet were shown being removed from a washing machine, would this constitute an illegal "demonstration"? (R. 135-36).

The Court below also found other words and phrases in the order difficult to apply. The bedsheet example demonstrates the nature of the ambiguity in some of these terms. Does, for example, such a depiction constitute "actual proof" of a "claim"? How could an advertiser possibly determine if it is "material to inducing its sale"?

<sup>\*\*</sup> The *Broch* case is not cited or discussed in the Commission's brief to this Court.

## III.

**The Court of Appeals exercised its proper function in reviewing the Commission's "theory of law".**

The Commission urges in Point II of its brief that the Court of Appeals exceeded the proper bounds of judicial review in setting aside the Commission's order.

It comes with ill grace for the Commission to complain of failures in the agency-court relationship after the Court of Appeals considered the Commission's order so comprehensively in its first opinion (R. 35 ff.) and thereafter was willing expressly to "make an exception" (R. 133) and reconsider the Commission's position on the merits in a second opinion as patient and detailed as was its first review (R. 131 ff.).

In any case, the Court of Appeals did not exceed the limits of judicial review of the Commission's decision. The judicial power extends to review of the agency's interpretation of the law (see, e.g., *Federal Trade Commission v. Gratz*, 253 U. S. 421); the sufficiency of the evidence to support its application of the law (*Federal Trade Commission v. Raladam Co.*, 283 U. S. 643); and the reasonableness of the proscription in relation to the harm sought to be avoided (*Jacob Siegel Co. v. Federal Trade Commission*, 327 U. S. 608). It is submitted that the Court below in no way exceeded its power.

This case was particularly appropriate for close judicial scrutiny. The decision of the Commission did not claim to be a determination of fact purporting to rely on Commission expertise, but was rather a rule of law newly announced by the Commission. The Commission itself stated that "our

[first] opinion failed to spell out sufficiently the *theory of law*\* on which the order was based. . . ." (R. 48) and repeated in its certiorari petition that "the Commission undertook in a second opinion to reconsider the entire case, restating the *theory of law* on which the 'demonstration' part of the order was based" [Pet. 4].

When the question is the interpretation of the legal standards of the Act, while the Commission's interpretation is of weight, it is ultimately for the courts to say whether it is right or wrong. See *Federal Trade Commission v. Gratz*, 253 U. S. 421, 427; *Federal Trade Commission v. R. F. Keppel & Bro., Inc.*, 291 U. S. 304, 314. Cf. *Automatic Canteen Co. v. Federal Trade Commission*, 346 U. S. 61, 81.

The Commission's brief, however, attempts to make of the decision below what it is not: an expression of disagreement with the Commission on matters confided to agency discretion. The Commission argues that the Court below improperly assessed "the balance of harms and needs," and that in any event such an assessment is for the Commission; it asserts that the Court held that the "occasional need to use substitutes" outweighed the harm caused by *material deception*, and that this judgment was incorrect and improper (Gov. Br. 17). It concludes, if "material misrepresentations are ever to be tolerated . . . it is for the Commission . . . to make the determination" (Gov. Br. 17).

The Commission's argument is itself a material misrepresentation of the Court's opinion. The Court did not hold that material misrepresentations were to be

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\* Emphasis supplied throughout, unless otherwise noted.

countenanced.\* As pointed out above, the Court held that the Commission's views were "short on analysis" and resulted in a "paradox" (R. 138); it held that the Commission was illogical in creating an implied misrepresentation and concluded that, in any event, no material misrepresentation occurred (R. 138). It is elementary that the Court's power to review extends to a determination of whether there is a "rational basis" for the Commission's decision. (See *Grace Line Inc. v. Federal Maritime Board*, 263 F. 2d 709, 711 (2d Cir. 1959), and cases there cited.)

Far from demonstrating that the Court was wrong, the Commission's brief repeats a further defect which the Court of Appeals found in the Commission's own analysis of this issue—that "In seeking to stress the extent of misrepresentation by mock-up the Commission sometimes loses sight of the difference between a mock-up which presents an accurate portrayal and one . . . that effects a basic deception" (R. 137).

The Commission's brief argues that "If *sham* tests are permissible, there is no means by which sellers of a *superior* product can convince skeptical purchasers of the *truthfulness* of their claims by furnishing visual, experimental proof to confirm their say-so. For the viewer will not be able to distinguish the real experimental proof from the rigged test and therefore will not be able to rely on any televised 'demonstration' of superiority" (Gov. Br. 20). The brief elsewhere freely sprinkles its discussion with "rigged", "sham", "fake", etc. (Gov. Br. 2, 3, 8, 9, 10, 11, 13, 16, 17, 19, 20, 21, 25).

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\* The only "assessment" performed by the Court was accompanied by a specific disclaimer as to the basis of its decision:

"While we do not make this the basis of our decision, we reiterate our former observation that an enforced remedy should not outdistance the need" (R. 139).

This argument is wholly spurious. "Sham", "rigged" and "fake", for the purposes of this case, necessarily mean only that a truthful mock-up was used—and it means this exclusively, for under the Commission's own hypothesis the visual impression conveyed to the viewer is precisely accurate and corresponds exactly with what the viewer would see if he himself saw a live demonstration. Therefore, by hypothesis, the viewer may indeed rely on such a demonstration of superiority.\*

Similarly, the Commission is confusing an actually "superior" product—superior in the sense that the product really can do what is claimed for it—with a product which is "superior" solely because it by happenstance possesses the quality of televising accurately.

The brief also argues that the Court of Appeals rested its decision "in large part on problems of compliance, administration and enforcement" (p. 21).\*\* This is again a material misrepresentation of the Court's opinion. The Court's discussion of the problems implicit in administering the Commission's order was directed to the underlying illogic of the theory on which the order was based. By pos-

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\* This confusion runs deep. The Court may note that the Question Presented in the Commission's petition for certiorari was at least straightforward enough to contain a parenthesis stating of the product claim that it "may itself be true" (p. 2); the Question Presented in the Commission's main brief no longer is willing to bring this fact to this Court's attention (p. 2).

\*\* In its petition for certiorari, the Commission argued "that the Commission could fairly conclude that the difficulties of defining sham demonstrations are less serious than the alternative method of dealing with the problem, including that suggested by the Court below" (Pet. 17). In its opposing brief Colgate pointed out that the Commission had never considered the "alternative method of dealing with the problem"—or indeed any alternative—and that the Court made its suggestion in response to an argument of counsel made for the first time, that the use of mock-ups presented policing problems (p. 11). Perhaps for this reason, the point has been dropped in the Commission's brief on the merits.

ing examples in problems of compliance, the Court merely illustrated the inadequacy of the Commission's basic analysis. As it said:

"[W]e envisage great difficulty in determining any dividing line between what is and what is not a test or experiment, or in defining what is a demonstration in the nature of such. *Primarily this may be because we find no substantial logical difference between what the Commission disapproves of and what it accepts*" (R. 135).

Petitioner's brief points to the Commission's willingness to give advance advice (Gov. Br. 23) and to the *National Lead* doctrine (Gov. Br. 25) as if the Court's objection was solely to the ambiguity and scope of the particular order. As noted, however, the Court's fundamental objection to the order is that there is no underlying rational basis for it (R. 136, 138). In fact, the Court took note of the Commission's continued reference to the possibility of advance advice and observed, "We think the very suggestion indicates the Commission's failure to realize the scope of the problem" (R. 136, n. 12).

It is obvious that to the Court the suggestion highlighted the Commission's failure to appreciate the irrationality and vagueness of its legal theory. The Court was amply justified. If a legal theory is defective, advance advice is an exercise in futility. Moreover, the Commission's suggestion is impractical even on its own terms: proposed advertising cannot wait for a prior license.\* We

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\* The instant situation is wholly different from *Vanity Fair Paper Mills, Inc. v. Federal Trade Commission*, 311 F. 2d 480, 488 (2d Cir. 1962), cited by the Commission (Gov. Br. 24), which involved a single advertising allowance program. The problem here involves many discrete television and pictorial advertisements which are continuously produced. Colgate alone manufactures several hundred products.



repeat, however, that the basic issue is not one of practicality. If the Commission's advance advice were sufficient to uphold its ambiguous orders, the *Broch* case has no purpose. Indeed, *Broch* itself, though applicable, does not dig to the foundation of this case: the illegality implied by the Commission does not exist.

It is submitted that the Commission's brief has failed to face up to the holdings of the Court. Instead of pointing out where the Court of Appeals was wrong in applying indisputably correct standards of review, it acts as though the Court applied the wrong standards. In this effort, the Commission (1) has blurred the underlying factual assumption in this case—that a precisely accurate image is placed upon the television screen; (2) has reiterated rules of law about which there is no dispute; and (3) has cited cases on the tailoring of orders to proven offenses which are totally inapplicable when there is no offense in the first place.

The Court of Appeals in two opinions thoroughly and patiently explored the Commission's reasoning and found it wanting. It is submitted that if an administrative agency's decision ever received careful and proper judicial review, this case is it.

#### IV.

**The petition for certiorari was not sought within the period allowed by law.**

In addition to lacking substantive merit, the instant writ of certiorari should be dismissed because it was not sought within the period required by the Federal Trade Commission Act and the Judicial Code.

### **A. The Manner in Which the Commission Proceeded.**

"The writ of certiorari challenges the First Circuit's rejection of the Commission's ruling that the mere use of the sandpaper mock-up was in itself an independent illegal "practice" under Section 5 of the Federal Trade Commission Act. The writ is addressed only to this substantive issue."

This very issue was presented to, and was considered and resolved by the Court of Appeals on November 20, 1962. The mandate which the First Circuit issued on that date did not hold the question in abeyance and order a further administrative determination thereon. Instead, the Court below squarely determined the truthful mock-up matter and exonerated respondents on this issue.

Confronted with this November 20, 1962 mandate, the Commission chose not to seek rehearing or reargument,\*\* and also chose not to seek certiorari.

Instead, the Commission chose to accept the First Circuit's mandate, but then disregarded its clear command. Instead of fashioning a remedy "in accordance with" the Court's ruling on the truthful mock-up question, the Commission proceeded on the same record to issue a new order which repeated the Commission's prohibition. The Com-

---

\* It is not addressed to the remedial issue of whether the Commission's present order was rendered in accordance with the November 20, 1962 mandate of the Court below.

\*\* The rules of the First Circuit permitted a motion for rehearing to be made within 15 days "after judgment is entered, unless the time is enlarged by order of the Court" (1st Cir. R. 31). However, when the First Circuit issued its November 20, 1962 mandate in this case, it had just previously, in another case involving the Commission, strongly rejected as untimely additional subsidiary arguments made in a duly filed petition for rehearing. See *Carr v. Federal Trade Commission*, 302 F. 2d 688 (1st Cir. 1962). By proceeding as it did, the Commission obviously was seeking to avoid renewing its arguments in such a posture.

mission also issued a new opinion which not only reiterated its already-rejected ruling, but also employed the same legal theory in support thereof.\*

In an effort to justify this extraordinary procedure, the Commission claimed that reconsideration was appropriate because its earlier presentation to the First Circuit had been unsatisfactory "due in large measure to 'extreme arguments' made by its counsel" (R. 98, 132 n. 4). The Commission also intimated that the Court below set aside its first cease and desist order merely because the order indiscriminately forbade all, and not just some truthful mock-ups (R. 48, 97-98). These rationalizations defy the plain language of the November 20, 1962 mandate. Instead of basing its ruling on any narrow ground, the Court below, with the example of the sandpaper demonstration before it for determination, examined the basic legal question of whether the mere use of a mock-up in the actual challenged advertising was in any respect a violation of the Act—and concluded that it was not (R. 39-43).

The Commission's failure to abide by the Court's clear holding on the truthful mock-up issue resulted in the case being brought before the Court of Appeals again on June 6, 1963. On December 17, 1963, the Court of Appeals again set aside the order of the Commission. Rather than modifying its November 20, 1962 holding on the truthful mock-up issue, the Court's second decision fully reiterated that

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\* The Commission's emphasis on such factors as (1) the sandpaper mock-up as the "heart" of the commercials; (2) the materiality of the mock-up's use as part of a test that "was, in reality, not taking place"; (3) the fact that this allegedly "faked" test purported to present "visible proof" of the product's attributes or qualities; (4) the distinction between the sandpaper test and other allegedly "harmless mock-ups"—had all been previously presented in its first opinion. As the Commission's brief states: "In its opinion on remand, the Commission restated its theory. . . ." (Gov. Br. 4).

holding in every respect. Only thereafter did the Commission for the first time seek certiorari on the question.

**B. By Proceeding As It Did, the Commission Ignored Statutory Requirements.**

The Federal Trade Commission Act and the Judicial Code clearly set forth the procedures to be followed in regard to judicial review of Commission cease and desist orders.

**1. The Federal Trade Commission Act.**

Under Section 5(c) of the Federal Trade Commission Act, all initial cease and desist orders of the Commission, and their concomitant "reports" or opinions, are subject to review by the courts of appeals, which have the "power to make and enter a decree affirming, modifying or setting aside the order of the Commission." However, Section 5(c) also requires that the review which it authorizes is to culminate in a judgment and decree by the court of appeals which "shall be final" (15 U. S. C. §45(c)), subject to review by this Court as provided in Title 28 U. S. C. §2101.\*

Therefore, after the November 20, 1962 remand was accepted, the Commission was no longer free to fashion a

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\* The Commission's reliance upon the rule expressed in *Securities and Exchange Commission v. Chenery Corp.*, 318 U. S. 80, 94 (R. 98), is completely misplaced. In *Chenery*, the SEC had not applied the statutory standard established for it by Congress but had instead based its order upon an erroneous non-statutory standard. Hence, the Court, on its initial review, could not render a final determination as to whether the agency's order could stand if the appropriate standard had been applied. It could only remand with instructions for the SEC to evaluate the facts according to this statutory standard. Only after the SEC did so could the Court, on its subsequent review, for the first time determine whether the administrative application of the statutory test had been correct. *Securities and Exchange Commission v. Chenery Corp.*, 332 U. S. 194, 198-201.

new order or opinion "in the same manner as though no prior order of the Commission had been rendered" (15 U. S. C. §45(j)). Thereafter, the further proceedings in this case were governed by the limitations contained in Section 5(i) of the Act (15 U. S. C. §45(i)).\*

Section 5(i) encompasses the procedures to be followed after "a decree has achieved finality" under Section 5(c), and therefore it, of course, precludes the Commission from issuing a new order and report *de novo*. Instead, Section 5(i) requires that whatever new order is issued by the Commission must be "rendered in accordance with the mandate of the court of appeals" which "modified or set aside" the initial order of the Commission.

The plain language of Sections 5(c) and (i) demonstrates Congress' determination to foreclose an administrative reassertion or restatement, on the same record, that the same facts already found to be unobjectionable on the earlier review by the Court of Appeals nevertheless constitute a violation of the Act. Such action obviously would be in defiance of, rather than "in accordance with" the earlier judicial mandate which the Act requires "shall be final". See also *Virginia Lincoln Furniture Corp. v. Commissioner*, 67 F. 2d 8 (4th Cir. 1933), cited by the Court below as dealing with a "comparable provision under the revenue acts" (R.132).

The Congressional purpose to prevent this manifests fair play and common sense. Any other construction of these provisions would permit the Commission to make its

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\* The Court below recognized this and noted in its second opinion that the Commission's actions after receiving the November 20, 1962 remand were governed by the limitations of Section 5(i) (R. 132). After pointing to the applicable restrictions of Section 5(i), the Court in its second decision nevertheless reiterated its position as to the merits merely as a matter of grace "in view of the Commission's antipathy to mock-ups" (R. 133).

arguments, and if the judicial resolution of an issue were not favorable, to reassert or change them as it pleased. In short, the Commission would proceed *de novo* as though the earlier judicial decision had never been rendered, and thus ignore the elementary principles of finality.\*

Since the writ of certiorari here is addressed to the underlying legality of the use of a truthful mock-up, which was determined by the November 20, 1962 mandate of the Court of Appeals, it deviates from the narrow remedial subject matter that is administratively and judicially reviewable under the Act after the remand of that mandate was accepted by the Commission. The Commission's attempt to go beyond the statutory limitations imposed by Congress under Sections 5(c) and (i) may not be countenanced.

## 2. The Judicial Code.

The plain language of Section 2101 of the Judicial Code contains a jurisdictional limitation on the period for seeking certiorari which also precludes the broad review sought by the Commission.

Rather than merely qualifying the right of a litigant to seek certiorari, Section 2101 circumscribes the power of the Court to entertain a writ; the statutory deadline is mandatory and jurisdictional in nature. See *Matton Steamboat Co. v. Murphy*, 319 U. S. 412, which recognized, in dealing with the predecessor of Section 2101 that "its language is peremptory", so that

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\* This Court has held that "litigation must at some definite point be brought to an end" (*Federal Trade Commission v. Minneapolis Honeywell Regulator Co.*, 344 U. S. 206, 213) and that "[a] pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy and inexpensive determination of every action': the touchstones of federal procedure," *Brown Shoe Co. v. United States*, 370 U. S. 294, 306.



"... after the expiration of the three months period, \* \* \* this Court is without jurisdiction to entertain the appeals, which are accordingly dismissed" (319 U. S. at 414-15).\*

The fact that the November 20, 1962 mandate of the Court below was confirmed without qualification over a year later on a new appeal brought by respondents to obtain relief from the Commission's improper actions does not revive the jurisdictional statutory deadline with respect to the truthful mock-up issue. Once a final judgment and decree is rendered by the Court of Appeals, the time period established by Section 2101 for obtaining certiorari is not extended by "the mere fact that [the] judgment previously entered has been reentered or revised in an immaterial way." *Federal Trade Commission v. Minneapolis Honeywell Regulator Co.*, 344 U. S. 206, 211:

"Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality" (344 U. S. at 211-12).

See also *Federal Power Commission v. Idaho Power Co.*, 344 U. S. 17, 20 ("If the Court did no more by the second judgment than to restate what it had decided by the first one, . . . the 90 days would start to run from the first judgment.")

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\* See also *Toledo Scale Co. v. Computing Scale Co.*, 261 U. S. 399, 418; *Rust Land & Lumber Co. v. Jackson*, 250 U. S. 71, 76; Stern & Gressman, *Supreme Court Practice* §7-1 at p. 202 (3d ed. 1962).

Even if the subsequent confirmation by the Court of Appeals were somehow viewed as a rehearing, it could not revive the jurisdictional statutory deadline since that deadline had completely lapsed many months before. At this late date in the case, jurisdiction to review the truthful mock-up issue, having utterly lapsed, could not be regained by the mere subsequent confirmation of the earlier decree. See *Credit Co. Ltd. v. Arkansas Central Ry. Co.*, 128 U. S. 258, which recognized that a confirming decree entered after the jurisdictional deadline for seeking review had lapsed could not rejuvenate that deadline:

"The attempt made, in this case, to anticipate the actual time of presenting and filing the appeal, by entering an order *nunc pro tunc*, does not help the case. When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter." (128 U. S. at 261).\*

Both *Safeway Stores v. Cpe.*, 136 F. 2d 771, 774-75 (D. C. Cir. 1943), and *Virginia Land Co. v. Miami Shipbuilding Corp.*, 201 F. 2d 506, 508 (5th Cir. 1953), interpret even the shorter deadline for seeking rehearing itself as being jurisdictional in nature, and therefore hold that no motion for rehearing, even if it is actually entertained,

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\* See also *Shotkin v. Weksler*, 254 F. 2d 596, 597 (5th Cir. 1958), cert. denied, 358 U. S. 855 (motion for rehearing filed after deadline for appeal had lapsed "cannot revive the time for filing the notice of appeal which had already expired" even if the court below "considered the motion on the merits") and *United States v. Healey*, 376 U. S. 75, 77, citing *Allegrucci v. United States*, 372 U. S. 954, as an example of a case rejecting "an attempt to rejuvenate an extinguished right to appeal."

can extend the appeal deadline unless the motion is timely in every respect.\*

Applying these precedents, the judicial power applicable to this case is not continuous and unqualified. Instead, it is curtailed by statutory restrictions which are mandatory and jurisdictional in nature. The governing limitations are clearly set forth in Sections 5(c) and (i) of the Federal Trade Commission Act, and in Section 2101 of the Judicial Code. These limitations compel the conclusion that the writ of certiorari raises a question which is time-barred and should be dismissed.

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\* Compare *Dcnholm & McKay Co. v. Commissioner of Internal Revenue*, 132 F.2d 243, 247-48 (1st Cir. 1942), which distinguishes the mandatory jurisdictional nature of the appeal deadline from that of the rehearing deadline.

Similarly, jurisdiction in a bankruptcy court is of a different nature from the appellate jurisdiction created for the Court below by the Federal Trade Commission Act (which contains Sections 5(c) and (i), and provides that the decree of the court of appeals "shall be final"). Jurisdiction in bankruptcy is continuous beyond the term of the court as to all matters, see 7 Moore, *Federal Practice* ¶ 73.01[5] at p. 3112 (1955 ed.).

Indeed, in bankruptcy, even certain time limitations for seeking review are not jurisdictional in nature. *Pfister v. Northern Illinois Finance Corp.*, 317 U. S. 144, 149. Since the limit is merely upon the right of the party, as opposed to the jurisdiction of the court, the court in its discretion may revive the right (317 U. S. at 151-53).

Professor Moore distinguishes the rehearing rule in bankruptcy from the rule under the Federal Rules of Civil Procedure which adopt "the rule formerly prevailing at law and in equity and under the better-described cases under the Civil Rules." 7 Moore, *Federal Practice*, *supra*, ¶ 73.09 at p. 3143.

**Conclusion.**

The judgment of the Court of Appeals should be affirmed or the writ of certiorari should be dismissed.

Respectfully submitted,

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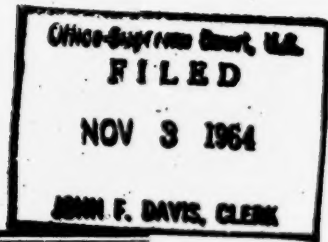
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November 3, 1964

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SUPREME COURT, U. S.

No. 62



# Supreme Court of the United States

OCTOBER TERM, 1964

FEDERAL TRADE COMMISSION, *Petitioner,*

*v.*

COLGATE-PALMOLIVE COMPANY and  
TED BATES & COMPANY, INC., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT TED BATES &  
COMPANY, INC.

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NOVEMBER 1964

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# Supreme Court of the United States

OCTOBER TERM, 1964

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No. 62

FEDERAL TRADE COMMISSION, *Petitioner*,

v.

COLGATE-PALMOLIVE COMPANY and  
TED BATES & COMPANY, INC., *Respondents*.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT

---

BRIEF FOR RESPONDENT TED BATES &  
COMPANY, INC.

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## QUESTION PRESENTED

Whether a television advertisement communicating a completely truthful claim as to the quality or merits of a product is illegal under Section 5 of the Federal Trade Commission Act solely because of the undisclosed use of a mock-up or prop.

## STATUTES INVOLVED

In addition to Section 5(a)(1) and 5(a)(6), set forth in the Government Brief (p. 2), this proceeding raises issues under Section 5(i) of the Federal Trade Commission Act, 52 Stat. 114, as amended, 15 U. S. C. § 45(i). That provision is set out in full text in an appendix to this Brief (p. 42, *infra*).

## STATEMENT

"We are considering no basic deception, but only the situation where, in illustrating faithfully a test which has been actually performed, an advertiser uses some foreign mock-up or makeup." (Aldrich, C. J., R. 136).

The question of law here presented is whether an advertisement that makes no false or misleading statement relating to the advertised product or what it can do can be held as a matter of law to be a false and misleading advertisement and therefore a deceptive or unfair practice under Section 5(a)(1) of the Federal Trade Commission Act.

As precisely focused in the Commission order set aside by the court below, the legal issue has been even more sharply delineated: Where an advertisement makes a completely truthful claim about what a product can do, and that claim is communicated by a faithful portrayal of a test or experiment, which test has in fact been performed and can be reproduced, is there any *factual* misrepresentation that violates Section 5 merely because in photographing that valid test or experiment there was an undisclosed use of a photographic prop or mock-up?

This is what Part I of the Commission's final order (R. 93-94), directed against the respondent Colgate-Palmolive Co., an advertiser, and Part III of its order (R. 94), directed against Ted Bates & Co., an advertising agency, prohibit. Those parts of the order rest upon a legal conclusion, reiterated by the Commission and rejected by the court below, that an advertisement that makes completely truthful claims concerning the advertised product or about what it can do is nevertheless *per se* deceptive whenever an undisclosed photographic prop is used in accurately portraying a test or experiment illustrating what the product in fact does.

Even more simply stated, the question is: If the viewer or reader of the advertisement buys the product, and it will

do exactly what the portrayal in the advertisement asserts it will do, can there be any unlawful misrepresentation?

The Government in its brief here, however, seeks to distort and obscure the issue by references to "sham tests" and "rigged experiments" and by posing the issue in terms of an advertisement that makes patently false claims.<sup>1</sup>

The question now posed was not tried in the hearing that was held on the Commission's complaint against the respondents.

*The Issue Not Before This Court—Misrepresentation  
Of Moisturizing Properties Of The Advertised Product*

In that proceeding, the Commission had charged that the challenged advertisements falsely made the claim that the advertised shaving cream had such moisturizing properties that it could be used even to shave coarse sandpaper rapidly and without prolonged soaking. This charge, denominated by the court below as the "single misrepresentation" (R. 42), indeed "trivial" (R. 38), was dismissed by the Commission's Hearing Examiner.

The Commission reversed the Examiner and held that the claim that the product could shave sandpaper rapidly and without soaking was false. It issued an order enjoining both respondents from

"misrepresenting, in any manner, directly or by implication, the quality or merits of [Rapid Shave or any other shaving cream]." (R. 8).

On the first appeal, the court below held that the Commission was justified in addressing an order to the particular misrepresentation it had found the respondents to have made. It held further, however, that since "respondents' only offense was the making of a single mispre-

<sup>1</sup> For example, the "Question Presented" in the Government's brief on the merits differs significantly from the "Question Presented" in the petition for certiorari. In the latter it was made clear that the order the Government seeks to sustain applies to an advertisement making "a product claim (which may itself be true)." The critical parenthetical phrase is omitted in the brief. (Compare Gov't Br. p. 2 with Pet. p. 2).

sentation about a single product" (R. 42), the scope of this part of the order was too broad. On remand the Commission entered a slightly revised order on this part of the case. (R. 94, 95).<sup>2</sup>

On their second appeal, respondents urged that, even with respect to this part of the revised order, the mandate had not been followed. The Court of Appeals again returned this part of the order to the Commission for further revision, for the reason that "the Commission has been preoccupied with its broad opposition to mock-ups and has never expressed its views with respect to the proper scope of an order directed to more narrowly conceived substantive misconduct." (R. 139).

These paragraphs of the order relating to the "single misrepresentation" charged in the original complaint are not here in issue. (Gov't Br. p. 6, n. 1). It is not accurate to state, as the Government does, that the reason they are not in issue is that they were "sustained by the court below." The reason they are not in issue is that in seeking review by this Court and reversal of the judgment of the Court of Appeals on another issue, the Government has not presented any question relating to them. The paragraphs of its order dealing with the "single misrepresentation" remain for reconsideration by the Commission on remand.<sup>3</sup>

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<sup>2</sup> The final order on remand was separated into four parts. Parts I and II applied to the advertiser, Colgate; and Parts III and IV applied to the advertising agency, Bates. Parts II and IV relate to the misrepresentation as to the moisturizing properties of the shaving cream. (R. 93-95).

<sup>3</sup> The Government asks that, if the judgment below is reversed, the case be remanded to the Court of Appeals "for entry of judgment affirming and enforcing the Commission's order." (Gov't Br. p. 25). This prayer is for broader relief than the Government would be entitled to in any circumstances and is grounded in the Government's misunderstanding of what was decided by the Court of Appeals. Even if this Court should be persuaded that the Commission's legal views on mock-ups had merit, the fact would remain that the Commission had been "preoccupied with its broad opposition to mock-ups" and had not focused on the proper scope of an order aimed at the "single misrepresentation" found to have

It was the "single misrepresentation" issue, relating to a claim concerning the qualities and merits of a particular shaving cream, that was tried before the Commission's Hearing Examiner. The Commission was affirmed by the Court of Appeals in its reversal of the Hearing Examiner's decision that this constituted nothing more than puffing, and only the scope of its order remains in question, and that issue is not in this Court.

*The Issue Before The Court—The Use of Photographic Props Or Mock-ups In An Advertisement Making Completely Truthful Claims*

What is before this Court is a completely different question—newly imported into this proceeding by the Commission itself after the evidentiary hearing was over—and in no way concerning any claim relating to the advertised product or what it can do.

That legal question arose out of the manner in which the claim relating to the advertised product was communicated in the advertisement. The assertion that with the aid of the advertised shaving cream sandpaper could be shaved was communicated in the video or picture part of the television commercial by a portrayal of sandpaper being shaved. Instead of sandpaper, however, a piece of plastic coated with sand was used in photographing the portrayal. This was done because, as the Hearing Examiner found and as has been accepted throughout this proceeding,

"When placed under a television camera, sandpaper appears to be nothing more than plain, colored paper; the texture or grain of the sandpaper is not shown. Thus it is necessary to improvise—use a mock-up—if what is seen by the television audience is to have the appearance of sandpaper." (R. 12).

been made by respondents. Since the Government has not in this Court questioned the part of the decision of the court below directing the Commission to reconsider that part of its order, the case must be remanded to the Commission for such reconsideration regardless of how this Court disposes of the question presented to it.



In short, had the claim that application of the shaving cream permitted sandpaper to be shaved promptly and without soaking been true, i.e., were the portrayed demonstration accurate in showing what the product could do, it still would have been necessary in faithfully photographing that test or experiment to use the sand-coated plastic mock-up or photographic prop.

In its first opinion, however, the Commission went wholly beyond the question whether the claim for the product that it could shave sandpaper was true or false. It took the position (and devoted the bulk of its opinion to attempting to sustain it) that *even if* a product can do everything that an advertisement represents it can do—even if the faithfully portrayed experiment or test is completely valid—there is still a violation of Section 5 where for any reason there is an undisclosed use of a photographic prop or mock-up. As the Commission posed this purely hypothetical issue, concerning which there was no evidence of record whatever:

“(2) Assuming that there was no misrepresentation as to the effectiveness of ‘Rapid Shave’ in shaving sandpaper, was there nonetheless a misrepresentation in the visual demonstration offered as proof of such effectiveness?” (R. 14).<sup>4</sup>

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<sup>4</sup> There can be no contention that the Commission did not recognize at the outset that it was dealing with a novel *question of law*. It elsewhere posed the question on the assumption “that the commercials did fairly and truthfully describe ‘Rapid Shave’s’ effectiveness in shaving sandpaper,” and whether, “if that were so, the commercials would be deceptive, within the meaning of the statute . . .” because of the use of a photographic prop alone. (R. 18).

That no evidence was introduced on the use of a photographic prop or mock-up in an advertisement, making a completely truthful claim, has not been and cannot be challenged by the Government. There was no evidence on any of the assumptions advanced here and in the court below in support of the Commission’s interpretation of the Act. During the course of oral arguments to the Hearing Examiner, counsel for the Commission stated: “The substitution of this plexiglass or this so-called mock-up for sandpaper might not be so important if you could shave this type of sandpaper in

In its first opinion, the Commission concluded as a matter of law that the undisclosed use of any mock-up or prop thus to portray a truthful claim about what an advertised product can do as a matter of law violated the Act. It entered a broad order, on the basis of that legal theory, against both respondents. On review, the issue was squarely presented whether the Commission's legal conclusion on the hypothetical issue was correct. As the court below put it, the basic issue was whether "mock-ups, or what the Commission chooses to call demonstrations that are not 'genuine', were illegal per se." (R. 42).

What cannot be escaped in this proceeding is that up to the time the Commission reversed its Hearing Examiner, the issue dealt with concerned a *false* claim communicated in part by portraying a photographic prop. After having disposed of the issue of the false claim concerning the product (an issue not before this Court), the Commission then turned to a hypothetical issue: whether the undisclosed use of a prop in a demonstration conveying a *completely truthful claim* about what the product could do would in and of itself be deceptive and render the advertisement false and misleading.<sup>5</sup>

In its decision and opinion on the first appeal, the court below concluded that, where an advertisement makes a

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the manner they show it on the television. But, the record establishes that you cannot shave sandpaper of this type in the manner shown on television. Therefore, there has been a misrepresentation of the moisturizing or soaking qualities of the shaving cream." (Record, Nos. 5972 and 5986, 1st Cir., p. 86).

<sup>5</sup> On the first appeal, the lower court remarked that, "On first reading we had thought that, in effect, it [the original order] simply forbade demonstrations which represented a product as doing something that it could not do, or as appearing to have qualities which it did not possess." But upon consideration the Court agreed that the order "would prohibit any demonstration even if it did not misstate facts about, or misrepresent the appearance of, the product, if it were not 'genuine' in that the actual substance used in the studio, because of technical problems of photography, was not the product itself." (R. 39-40). (Emphasis added).

completely truthful claim about what a product can do, the advertisement is not unlawful under the Act. If a portrayed demonstration, test or experiment (employing a photographic prop or mock-up) truthfully communicates what the product can do, there is no deception. "The viewer is not buying the particular substance he sees in the studio; he is buying the product. By hypothesis, when he receives the product it will be exactly as he understood it would be." (R. 42). The Commission's order was set aside, and the proceeding remanded.

The Commission did not seek review by certiorari on the controlling question of law that had been decided. It did not ask for reargument in the Court of Appeals. It accepted the remand from the Court of Appeals, and on remand it issued a further opinion (R. 47-60) reiterating its legal position on the stated premise that its earlier opinion had "failed to spell out sufficiently the theory of law on which the order was based." (R. 48). At the same time, it entered a second order, applicable to an advertisement making completely truthful product claims, which prohibited any "visual test or demonstration" that in its photographing employed

"a mock-up or substitute material or article . . . instead of the genuine material or article represented to be used therein." (R. 45).

After considering objections filed by respondents (R. 61, 72), the Commission issued a *third* memorandum opinion (R. 96-98) and entered a *third* and final order (R. 93-95).

This final order was predicated upon the Commission's continued insistence that it could as a matter of law prohibit as violative of Section 5 of the Federal Trade Commission Act the undisclosed use of a photographic prop or mock-up in an advertisement portraying a test or experiment truthfully claiming what a product could in fact do, and that it could do so "regardless whether the product actually possesses such quality or merit." (R. 52). In its certiorari petition (Pet. p. 2) and in its brief here (Gov't Br. pp. 16, 18) the Government concedes, though somewhat

grudgingly in its brief,<sup>6</sup> that this final order (Parts I and III), entered after remand, applies even though the product claim is wholly true.

Respondents again petitioned for review, on the ground that the Commission had flouted the decision and mandate of the lower court. In its opinion, on this appeal, the court below concluded that its mandate on the first appeal had not been honored.<sup>7</sup>

The court undertook in addition to examine the Commission's restated legal basis for an order barring undisclosed use of photographic props in advertisements making truthful claims about what a product can do. On that controlling legal issue, the court below reiterated its original decision that the statute did not reach as a deceptive or unfair practice the portrayal of a test or experiment showing what the advertised product could in fact do merely because a photographic prop or mock-up was used in photographing

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<sup>6</sup> The Government in its brief persists in trying to color the mock-up issue that is before this Court with the false product claim issue that is not. Mostly it does this by the transparent means of using phrases such as "rigged tests" and "sham experiments" to describe portrayals with the aid of mock-ups or photographic props of tests that have been and can be made and that prove a quality claimed for a product. In addition, however, the Government seeks at one point to confuse matters by speaking of the danger of "not merely a false claim as to a product's capabilities, but the *further* false claim that these capabilities are being proven to the viewer by a test which the viewer is watching." (Gov't Br. p. 8). (Emphasis added). See *supra*, p. 3 n. 1, for discussion of the way an explicit concession that the Commission's order applies to advertisements making truthful claims, included in "Question Presented" in the Government's petition, is omitted from the "Question Presented" in its brief.

<sup>7</sup> The court below said, in its second opinion, "We reached a number of conclusions [in the court's first opinion] not labeled suggestions which the Commission was not free to disregard under the mandate." (R. 132). It instructed the Commission "as we thought we had directed it before" to enter an order confined to the facts of the case. (R. 139). No commentator on the present proceeding has reached a conclusion other than that the Commission did not comply with the mandate. See, e.g., Note, *The Rapid Shave Case*, 38 Notre Dame Law. 350, 354 (1963); Millstein, *The Federal Trade Commission and False Advertising*, 64 Colum. L. Rev. 439, 486 (1964).

a completely truthful test or experiment that had been and could be performed. (R. 136-37). "If there is an accurate portrayal of the product's attributes or performance, there is no deceit" (R. 138) because

"so far as deceit is concerned the buyer is interested in what he thinks he sees, and if what he buys can do and has done exactly what he thinks he sees it do, he has not been misled to any substantial degree." (R. 136).<sup>8</sup>

In the present case, a photographic prop was necessary because of inherent limitations of the television camera. (R. 12; cf. Gov't Br. p. 18). To point up the legal issue here presented and the impact of the order resting on it, there is illustrated on the opposite page an example offered to the Commission (R. 78) and in our brief in opposition (p. 21). Here the necessity for using a photographic mock-up in the truthful presentation of a test or experiment is equally evident even though it does not reside merely in the limitations of the television camera.

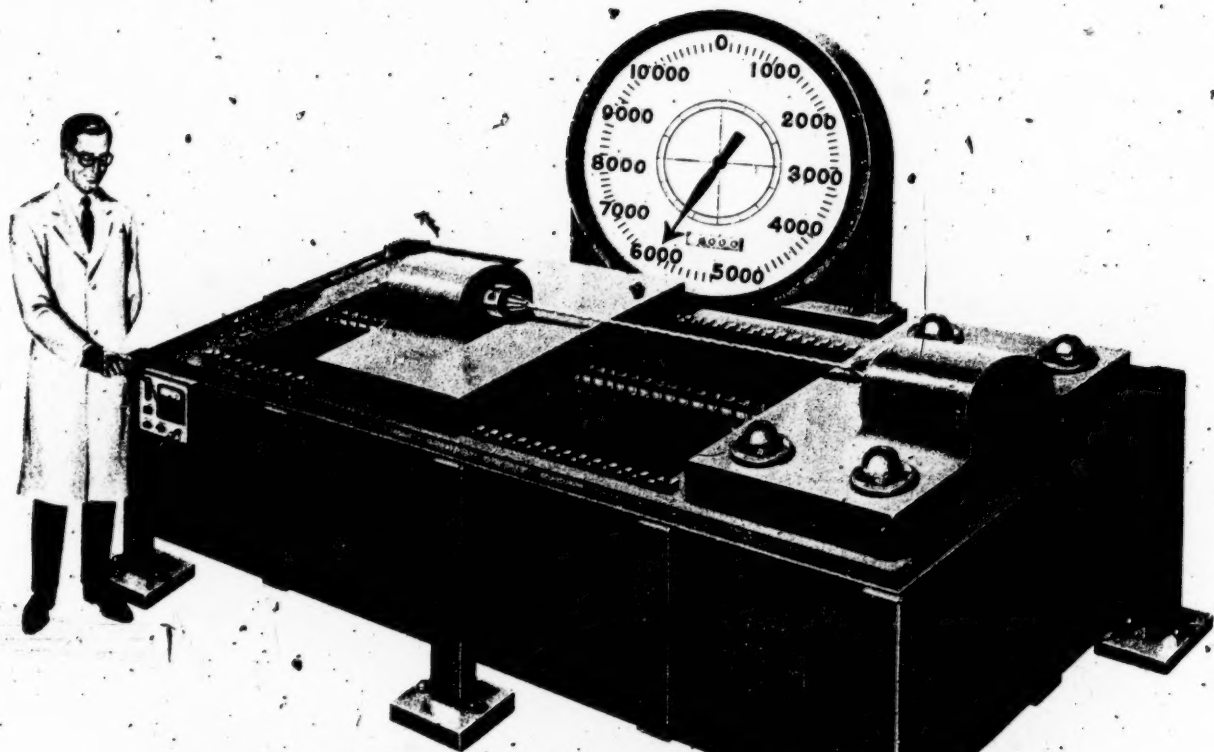
The claim that the advertised nylon rope will withstand 6,000 pounds of pull is true. The test or experiment proving this has been performed. The test can be performed again with the same result. But photographing the testing

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<sup>8</sup> The first opinion in this case in the meantime had been followed in *Carter Products, Inc. v. FTC*, 323 F. 2d 523 (5th Cir. 1963). In that case, where the order was reversed on September 27, 1963, the Commission on remand followed the court's mandate and rewrote its order on December 6, 1963, long before the certiorari petition in this case was filed on April 15, 1964.

Its rewritten order prohibited "pictures, depictions or demonstrations" to support comparative product claims only where the "portrayal or depiction is not an accurate comparison of such product with competing products." *Modified Order on Remand*, F.T.C. Docket 7943, Dec. 6, 1963.

Thus, although *Carter Products* was a mock-up and prop case, the final order does not prohibit the use of mock-ups to make truthful claims for the product advertised. Had the Commission, on remand in the present case, similarly limited its order to prohibit the undisclosed use of mock-ups or props in portrayals that made inaccurate claims about what the product could do, there would have been some timely consistency in its legal doctrine.



**Our ½ inch nylon rope will  
withstand 6,000 pounds of pull**



machine *in situ* is not feasible for many reasons. The particular machine is located in a crowded testing laboratory, surrounded by other machines, precluding an unobstructed photograph in the needed perspective. Transportation of this extremely heavy and bulky testing machine, weighing several tons, to the photographic studio is both impracticable and, even were it possible, would be extremely costly.

The mock-up of the testing machine is a completely faithful reproduction, in papier-maché, of the heavy steel machine itself. What the machine is portrayed doing is accurate, has been done and is reproducible. The rope shown being pulled and measured is a photographic prop made of cotton and not nylon because the nylon rope is so strong that in the reproduction of the test it would pull the machine mock-up apart. The strength claim made for the product is completely true; the product will do exactly what is claimed for it by the portrayal, and the depicted test proving the claim has been and can be performed precisely as seen by the viewer.

The legal question thus presented is whether the use of the photographic prop and mock-up is in any way deceptive to the purchaser, who, induced by this advertisement to purchase the rope, will get precisely what this advertisement asserts he will get.

#### SUMMARY OF ARGUMENT

##### I

A. The question presented by the Government in this Court involves the hypothetical case of an advertisement that makes a completely truthful claim for the advertised product and does so by a portrayal, in which a photographic prop or mock-up is used, of a test, experiment or demonstration that has been and can be performed and that shows the claimed quality of the product. In such a portrayal there is no deception of the viewer. There is no material misrepresentation. There is therefore no violation of Section 5 of the Federal Trade Commisison Act.

The hypothetical advertisement used as a predicate for the Commission's order makes two claims. One is that the product advertised has certain qualities and the second is that this primary claim has been and can be verified by a test or experiment. These are the only factual representations the advertisement makes relating to the product. They are the promise of the advertisement, and because both claims are true the promise is kept and there is no deception.

The Commission sees a further implied representation that what the viewer is seeing is the test or experiment itself and not a faithful photographic portrayal, which because of photographic necessity or for convenience uses a prop or mock-up. The position of the Government and the Commission concerning this supposed implied representation rests upon a fundamental confusion of what an advertisement says—the promise it makes about the advertised product—and the means used to convey the message. It is only in the message itself, however conveyed, that any representation relating to the product is made. To be sure, a viewer is entitled to infer that he has not been tricked by photography in the portrayal of the test or experiment that demonstrates a product's qualities. Where that occurs the portrayal makes a false claim as to what the product can do. But the viewer has not been tricked, and therefore what he may reasonably infer is true, in a case where, as here presented, there is an accurate portrayal of a test or experiment that has been and can be performed.

A misrepresentation in an advertisement is actionable under Section 5 of the Federal Trade Commission Act as unfair or deceptive only if it is a material misrepresentation. Even if one strains and assumes the existence of the implied representation that the Government (without record support of any kind) urges is seen in an advertisement portraying a test or experiment, the representation is plainly immaterial. A material representation is one that moves the reader or viewer to become a buyer. What induces the buyer to purchase is the claim that the product will per-

form as represented in the portrayed test. That is the material claim. His decision whether to purchase will not be affected by the technique used in portraying the test proving the claim.

B. There is, contrary to the Government's assertion, no judicial precedent for the novel position the Commission has taken—that an advertisement that conveys a message concerning a product that is completely truthful may nevertheless be deemed deceptive because of the means used to convey the message. There is no doubt that Section 5 of the Federal Trade Commission Act prohibits intentional misrepresentation of any fact that would constitute a material factor in a purchaser's decision whether to buy. The fact is, however, that the cases that have established this rule all involve misrepresentations concerning the product itself and not the method by which a representation is made. None of them confused the technique for conveying a message with what the message says.

Nor are hypothetical analogies suggested by the Government any more helpful to it than the decided cases. An advertiser would, as the Government says, almost certainly be prohibited under Section 5 from representing that he is a minister or a judge or a relative of the buyer, thus implying that he can be trusted in what he says. But this is an inapposite and utterly false analogy to the present case. An apter analogy would be to an advertiser who is a judge or minister but who, if a judge, is photographed wearing a red robe that appears black on television or, if a minister, a blue clerical collar that appears white when photographed.

C. The Commission's order cannot be sustained as an exercise of administrative discretion that is reviewable only for abuse of discretion. The argument that is made to support this position is completely circular. It assumes that a material misrepresentation has been made and that the Commission is exclusively entitled to weigh the harms caused by such a misrepresentation against the asserted

need for it in determining whether the misrepresentation should be proscribed. Administrative discretion can be invoked only if the Commission is right in its legal conclusion, as to which there is no doubt that the courts have the last word, that the advertisement hypothesized by the Commission does indeed make a material factual misrepresentation.

Second, if there were any room for the exercise of administrative discretion in this case, it could only be exercised on facts of record. There are no such facts here because the issue as now posed to this Court was not tried in the proceeding before the Commission's Hearing Examiner. What the Government says in its brief, therefore, and what the Commission has said in its opinions about the supposed harms of some advertisements that do not misrepresent the qualities of the advertised products is no more than surmise. Moreover, the arguments sought to be used to sustain a supposed exercise of Commission discretion are unfounded. They rest upon such transparent devices as the characterization of the kind of advertisements that are in issue as "rigged tests" and "sham experiments," and they hypothesize a viewer who is tricked when in fact, if the viewer becomes a purchaser, he will have purchased a product with exactly the qualities claimed for it in the advertisement he saw.

## II

The Court of Appeals found in the Commission's order serious ambiguities. It saw these as inherent in any order based upon the proposition of law asserted by the Commission—that an advertisement making a completely truthful claim for a product may nevertheless be prohibited because of the undisclosed use of a prop or mock-up in a portrayal of a test or experiment that had been performed. The court could properly have set aside the Commission's order for its ambiguities without more, under this Court's decision in *FTC v. Henry Broch & Co.*, 368 U. S. 360, 367-68 (1962). The Government's arguments in support of the Commission's order on this score amount to concessions of

its ambiguity. Nevertheless, it was not mere problems of administration or compliance deriving from ambiguity that prompted the court below to set the Commission's order aside.

Rather, it found that the ambiguities in the Commission's order arose from the basic illogic of the distinction the Commission has purported to draw between the undisclosed use of props or mock-ups in portraying a test or experiment and their use in merely portraying a product, as in the use of mashed potatoes to represent ice cream under hot television lights. The court, indeed, said that "the nub of the case" was either that in a test or experiment situation the advertiser impliedly states that what the viewer sees is what is happening in a laboratory at that moment, and the ice cream manufacturer does not impliedly represent that what the viewer sees is ice cream, or that the representation is material in the first case but not in the second. The Commission, the court said, "says the ice cream case is different, but, with all deference, we find its opinion, while long on generalities, short on analysis." The kind of analysis that, if it were possible to do so, would justify the distinction the Commission has drawn is also lacking in the Government's brief in this Court. In a rational system of law a supposed legal principle cannot be a governing principle if it includes some situations and excludes others on a concept of inclusion and exclusion that cannot be articulated in terms of reason and logic.

### III

When the Court of Appeals first heard this case, on the petitions of respondents to review the Commission's original order in the matter, it squarely rejected the proposition of law on which that order was based. It directed the Commission to write "an entirely new order" that would be "in accordance with" an opinion of the court that held that the undisclosed use of props or mock-ups to make truthful claims could not be prohibited under the Act.

The Commission did not ask for rehearing nor did it petition this Court for review of the Court of Appeals' judgment by certiorari. Instead, it accepted the Court of Appeals' remand. But it then merely revised its order slightly, and it did not retreat from or alter the underlying legal proposition that is the predicate for its order, which the Court of Appeals had rejected. The Commission so acted in the full knowledge that what it was doing would not be regarded as substantial compliance with the Court of Appeals' mandate and that the case would return to the Court of Appeals.

Although the Court of Appeals was quite clear that its mandate had been flouted, it indulged the Commission in its obduracy by examining the merits of its position. This Court is not bound by that act of grace, and it should hold that the Commission did not proceed in accordance with the mandate of the court below and its final order should be set aside for that reason alone. This Court is responsible for supervising the administration of justice by the federal courts. It is vital to the effective administration of justice that inferior tribunals, including administrative agencies, obey the decisions of the courts empowered to review their judgments. Indeed, Congress in Section 5(i) of the Federal Trade Commission Act has specifically provided that an order of the Commission on remand from a reviewing court must comply with the mandate of that court. That Congressional command should be enforced in this case.



## ARGUMENT

- I. AN ADVERTISEMENT MAKING A COMPLETELY TRUTHFUL CLAIM FOR A PRODUCT, BY ACCURATELY PORTRAYING A TEST OR EXPERIMENT THAT CAN BE AND HAS BEEN PERFORMED, IS NOT FALSE OR MISLEADING, OR UNFAIR OR DECEPTIVE, SOLELY BECAUSE A PHOTOGRAPHIC PROP OR MOCK-UP IS USED IN PHOTOGRAPHING IT.**

The Government makes what purport to be two separate arguments in support of the parts of the Commission's order that are in issue. The first is that a material factual misrepresentation is somehow to be inferred from an advertisement showing accurately, with the aid of photographic props or mock-ups, a test or experiment that has been and can be performed and that communicates a truthful claim for a product, and that therefore such an advertisement is as a matter of law violative of Section 5 of the Federal Trade Commission Act. (Gov't Br. pp. 10-16). The second argument is that the question whether such an advertisement is condemned under Section 5 has been committed to the discretion of the Commission. (Gov't Br. pp. 16-21).

We shall show in this part of our argument that the Government is wrong in its first contention because the words of the statute—unfair or deceptive—cannot be made to comprehend an advertisement that makes with complete accuracy a truthful claim for the advertised product. We shall show further that the statute has never been construed to reach such an advertisement. We shall also show that the second, professedly independent, contention of the Government depends for its validity on the first in that, on the Government's own statement of the matter, the claimed discretion of the Commission is not invoked until and unless a material misrepresentation is discerned; furthermore, the Government's appeal for deference to the Commission's expert judgment rests on assertions of fact that are invalid and at best are mere surmises, which were not and could not have been found by the Commission because in the evidentiary record before it there was no evidence going to the legal issue hypothetically imported into the case.

**4. WHERE A PHOTOGRAPHIC PROP IS USED IN PORTRAYING A TEST OR EXPERIMENT THAT HAS BEEN PERFORMED AND THE CLAIMS ABOUT WHAT THE PRODUCT CAN DO ARE TRUTHFUL, THERE IS NO DECEPTION UNDER THE ACT.**

The Government argues that where a photographic prop or mock-up is used faithfully to portray a test or experiment—which has in fact been performed and which makes a claim about what the product can do that is completely truthful—there is nevertheless an unlawful deception or false representation. Stripped of its colorful adjectives, the contention is that this constitutes “the use of factual representations” that are false and that induce the viewer to purchase the product. (Gov’t Br. pp. 10-11).

**1. WHERE A FAITHFULLY PORTRAYED EXPERIMENT IS PRESENTED, THE UNDISCLOSED USE OF A PHOTOGRAPHIC PROP OR MOCK-UP BY ITSELF MAKES NO FACTUAL REPRESENTATION RELATING TO THE PRODUCT.**

What are the factual representations about the product? The hypothetical advertisement on which the Commission erected its legal theory and that it prohibited by its order makes two claims: first, that the product has certain merits or qualities, *e.g.*, that shaving cream will shave sandpaper, or that nylon rope will sustain a specified pull; and, second, that this claim about what the product will do has been verified by an experiment or test.

Both of these claims about the product and what a test has proved that it will do are completely true. In neither of them is there any deception. These truthful claims are of course advanced to induce the purchase of the product. And when the purchaser buys the advertised product, it will do what the advertisement claims it will do.

These are the only factual representations that the advertisement makes about the product. The Commission in its opinions and the Government in its brief on the Commission’s behalf contend that there is a further implied representation that the portrayal of the experiment or test not only shows a valid test, which has been performed with or on the product, but also unlawfully implies that no photographic props or mock-ups have been employed in faithfully portraying the test.

It is difficult to penetrate what the Government contends is this further implied "representation." What cannot be challenged is that whatever the Government is talking about has no direct or indirect relation to the product, who manufactures it, its qualities or merits, or the validity of the portrayed test demonstrating those merits. What the viewer sees and hears or reads is the *promise* of the advertisement and the factual representations it makes.<sup>9</sup>

The suggestion is advanced that the viewers are "led to believe that they [are] seeing visual proof of the respondents' claims in the form of a test." (Gov't Br. p. 11). They are seeing an accurate presentation of the such proof because the test portrayed has been performed, and it *does* prove the claim. As the court below observed:

"The viewer is not buying the particular substance he sees in the studio; he is buying the product. By hypothesis, when he receives the product it will be exactly as he understood it would be." (R. 42).

The next formulation is that a photographic portrayal of an actual test, which has been performed and which proves the claim, is offered "to hold out something beyond the sponsor's say-so as proof of the truth of the sponsor's claims." (Gov't Br. p. 11). Of course, if the test has in fact been performed, it is proof of the claim. If the portrayal—what the viewer sees on the screen—is a faithful portrayal of the test, what the advertiser is offering as more than his "say-so" is truthful.<sup>10</sup>

<sup>9</sup> An advertisement is a promise to the purchaser about the advertised product. If that promise is kept, there is neither deception nor falsity in the advertisement.

<sup>10</sup> Completely different verbal formulations in this effort to convert a truthful advertisement into a factual misrepresentation have run throughout this case. On the first appeal, the Commission position was that the misrepresentation lay in a depiction that was not "genuine and accurate." As to this, see R. 39-40, particularly n. 7.

In its second opinion, the Commission relied on "the popular belief that 'the camera doesn't lie'" (R. 49) and then rested on simply calling the use of a mock-up a material falsehood, or even

A formulation that the Government seems to favor, presumably because of its vividness, comes from the original opinion of the Commission:

"[T]he pictorial test of 'Rapid Shave,' proving to any doubting Thomas in the vast audience that 'By golly, it really *can* shave sandpaper!' was the clinching argument made by the commercials. The 'sandpaper test' was conducted, as the announcer said, '[t]o prove Rapid Shave's super-moisturizing power. . . .' Without this visible proof of its qualities, some viewers might not have been persuaded to buy the product." (R. 21; Gov't Br. pp. 11-12).

To apply this formulation to the nylon rope advertisement illustrated *supra*, pp. 10-11, the advertisement does indeed say to the viewer, including any "doubting Thomas," that "By golly, that brand of nylon rope does hold 6,000 pounds!" (Cf. R. 21). That is a completely true representation and the experiment or test on the machine did demonstrate that it was true. By itself, the use of the mock-up makes no additional factual representation.

The Government position boils down to saying that inherent in every photographic portrayal of a test or experiment demonstrating a product claim is an implied factual representation not merely that everything the advertisement tells the viewer about the product is completely true—but also that no undisclosed props or mock-ups or photographic techniques were used in photographing the presentation.

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fraud (R. 52-53). It never faced the basic question why, if the camera shows what the product in truth and in fact will do, there is any deception, or remotely any fraud or false factual representation about the product."

In its brief on the second appeal, the Commission, through different counsel, rested its theory on the proposition that in the circumstances sought to be reached by its order advertisers would have "falsely represented that their product claims have been verified by objective proof." (Comm. Br. 12). But if the experiment or test concerned had been and can be performed, the claimed verification of product claims by experimental proof is a true representation.

The cardinal difficulty with the Government's position is that it confuses the factual representation made by an advertisement, the promise it makes about what the product will do, with the method used to communicate that promise. The assumption, made wholly without any evidence of record, is that the viewer's determination to buy or not to buy the product might turn, not on whether the tests are valid and the claims are true, but on whether the faithfully portrayed experiment was photographed in a laboratory rather than in a studio.

If the Commission is right that there is conveyed to the viewer an implied representation that he is seeing an actual test before his very eyes in the laboratory, and that this is significant to him (Gov't Br. p. 21), then many normal practices in television such as prerecording commercials are suspect on the Commission theory. But the Commission has never suggested that this is so, perhaps because if it attempted to distinguish live from filmed or taped commercials, the pointlessness of its concern with the irrelevant question of photographic techniques would be glaringly apparent. There is no more logic in the Government's concern with means of communication than there would be in a suggestion that an overseas message accurately transmitted would have any different meaning depending on whether it came by transoceanic cable or by radio. The *method* used to convey the message does not qualify the faithful transmission.

It is no more a "factual misrepresentation" about a product to employ a photographic prop in photographing an accurate portrayal of a test than it is to use a painted backdrop in a studio, red colored water to simulate tea, an artificial head on a photographed glass of beer or mashed potatoes to portray ice cream—none of which props or mock-ups the Commission regards as "factual misrepresentations which are deceptive." Where these uses of photographic props or mock-ups convey to the consumer a truthful claim about the product, their use does not collaterally constitute an implied factual misrepresentation relating to the product. The consumer is interested in what the advertisement says to him, not in the photo-



graphic method used to convey the message. It is unwarranted to suggest that the use of a photographic prop or mock-up, in and of itself, makes any factual representation relating to the product or what it can do.

Of course it is reasonable to assume, as did the court below, that the viewer will infer that "no basic dishonesty has been introduced into the picture by the photographic process." (R. 138). Where there is any such dishonesty, the portrayal makes a false claim as to what the product can do. Yet the Commission's legal theory and its order on mock-ups and props do not deal with that point. Photographic dishonesty is not an element of what is forbidden by the order. It proscribes any undisclosed use of a prop or mock-up even where the photographic portrayal is faithful and accurate. But where the actual test performed is faithfully portrayed, any implied representation of no photographic dishonesty is honored, and there is no deception whatever.

2. ONLY MATERIAL MISREPRESENTATIONS ARE UNLAWFUL, AND ANY IMPLIED REPRESENTATION OF THE KIND INFERRED BY THE GOVERNMENT IN THE HYPOTHESIZED ADVERTISEMENT IS IMMATERIAL.

The Government recognizes throughout that if it is to be held unlawful any factual misrepresentation in a challenged advertisement must be material in that the purchaser's determination to buy will be affected by it. (*E. g.*, Gov't Br. pp. 9, 10). A television commercial portraying a woman being sawed in half would obviously be false, but no purchaser would be affected in his buying by that falsity.

Accordingly, even if credulity is stretched, and in the hypothetical situation the Commission erected as a basis for its order it is assumed that an advertisement portraying an accurate test through the use of a photographic mock-up nevertheless makes an implied "factual misrepresentation" directly relating to the advertised product, the challenged advertisement is unlawful only if it is misleading in a material respect. Only material misrepresentations are illegal under Section 5 of the Act.<sup>11</sup>

<sup>11</sup> Sections 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. §§ 52, 55, are instructive on this point. They were added



The implied representation that the Commission and the Government assume to see is that not only has the depicted test been made and it is accurately portrayed, but also that it was photographed *in situ* without the use of photographic props or mock-ups. If this is an implied factual representation relating to the product, it is plainly immaterial. The viewer will be induced to buy by the claim that the product will perform as represented in the portrayed test. He has no interest in and his purchase is not affected by whether the portrayed test was photographed in the laboratory or in the studio, in black and white or in color, or with or without the use of a photographic prop or mockup. As the court below observed, the viewer is not buying the photographic technique; "he is buying the product." (R. 42).

The legal rule here invented by the Commission—for the hypothetical situation to which its order is directed—is inconsistent with the legal yardstick it applies in determining the meaning of advertisements. In *Heinz W. Kirchner*, 3 CCH Trade Reg. Rep. ¶ 16,664 (Nov. 7, 1963), the advertiser claimed that a swimming aid to be worn underneath a bathing suit was "thin and invisible." This was a direct advertising claim and not merely an assumed implication. Commissioner Elman, the author of the two opinions in the present proceeding, held for the Commission that the advertisement in this aspect was not unlawfully deceptive. In so doing he observed:

"An advertiser cannot be charged with liability in respect of every conceivable misconception, however outlandish, to which his representations might be sub-

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by the Wheeler-Lea Act of 1938, 52 Stat. 111, the same statute that amended § 5 to include the prohibition of "unfair or deceptive practices" as well as "unfair methods of competition." Section 12(a) makes it unlawful to disseminate "any false advertisement" concerning foods, drugs, devices, or cosmetics. Section 12(b) makes any such dissemination an "unfair or deceptive act or practice" within the meaning of § 5. Section 15 defines a "false advertisement" as one that is "misleading in a material respect."

ject among the foolish or feeble-minded. Some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim. Perhaps a few misguided souls believe, for example, that all 'Danish pastry' is made in Denmark. Is it, therefore, an actionable deception to advertise 'Danish pastry' when it is made in this country? Of course not." 3 CCH Trade Reg. Rep. at 21,539-40.

*A fortiori*, on the issue here presented, where everything the advertisement communicates relating to the product and what it can do is completely truthful; where any assumed inference on the part of the viewer that the accurate portrayal was photographed in the laboratory rather than faithfully portrayed by photography in a studio would be an inference of a wholly immaterial representation, unrelated to what the advertisement claims about the product to induce the viewer to purchase, the advertisement is neither false nor misleading nor deceptive within the meaning of the statute. It is not a representation in any way relating to the product or to its purchase, so that even if the strained suggestion that there is such an implied representation were realistic, the representation plainly would be immaterial.

B. *THERE IS NO PRECEDENT FOR HOLDING THAT THE USE OF A PHOTOGRAPHIC PROP OR MOCK-UP IN PORTRAYING A TRUE EXPERIMENT IS PER SE A DECEPTIVE OR UNFAIR PRACTICE UNDER THE ACT.*

To buttress its conclusion that the undisclosed use of a photographic prop in photographing a test or experiment, in an advertisement making completely true claims about a product, is *per se* illegal, the Government asserts that there are controlling judicial precedents for its position. In that assertion the Government is wrong.

The Government's attempted argument based on authority necessarily assumes its own conclusion. We agree that it is settled that Section 5 proscribes "the intentional misrepresentation of *any* fact which would constitute a mate-

rial factor in a purchaser's decision to buy a product." (Gov't Br. p. 13). But in every decision in which that general rule was evolved and has been applied the misrepresentation related to the product and in no instance did it concern the method by which any representation concerning the product was communicated. None of the cases confused, as the Commission and the Government arguing on its behalf have, *how* an advertised message is communicated with *what* it says.

This is true whether the advertisement made a direct or implied claim about the quality or merits of the product, *FTC v. Algoma Lumber Co.*, 291 U. S. 67 (1934), or the statement relating to the product had to do with what the Commission now terms "extrinsic factors." (Gov't Br. p. 14). The cases are discussed in the margin.<sup>12</sup>

Departing from the decided cases, the Government resorts to the analogue of an advertiser stating falsely that he is a minister or a judge or a relative of the buyer, thereby implying that he can be trusted "as to the truth of his claims." It is asserted that "regardless of the truth or falsity of the claims made for the product, such deception in the means of convincing buyers of the truth of the claims is unfair both to purchasers and to

<sup>12</sup> In *FTC v. Standard Educ. Soc'y*, 86 F. 2d 692 (2d Cir. 1936), *modified*, 302 U.S. 112 (1937), the fact that the offer was restricted was an inducement to purchase that related to the product, and not to how that fact was communicated. This is true of every case cited by the Government. The failure to disclose the country of origin of a product is, under some circumstances, a false implied representation of domestic origin. But that falsity has to do with what is said about the product, not with how the message is conveyed. A false representation about actual origin goes to the quality of the product, e.g., "Havana Cigar." *El Moro Cigar Co. v. FTC*, 107 F. 2d 429 (4th Cir. 1939); cf. *Korber Hats, Inc. v. FTC*, 311 F. 2d 358 (1st Cir. 1962). In *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933), the statement of the seller's trade status was false, and the representation that the seller was the original miller obviously concerned the quality of the product. The Commission's attempted citation to false testimonials was twice completely dissipated by the court below (R. 41 n.9, 137 n.14), which cogently pointed out that the correct analogy would be to a testimonial that had been received but that was merely recopied in the advertisement because, for example, the original would not reproduce.

honest competitors." (Gov't Br. p. 15). The analogue is wholly inapposite. An apter analogy would be a situation where the seller was in fact a judge or minister. Would the advertisement become materially false or misleading because he wore a red robe that would appear black when photographed for television, or a blue clerical collar that would appear white when photographed? If he were in fact a relative, would the application of make-up to accentuate the family resemblance, prior to his being photographed, in any way affect the truth of the claim? Would, as the Government here argues, any viewer be "significantly deceived in the exercise of his preferences," or in believing the statements advanced by the judge, minister, or relative, by these photographic techniques so long as the underlying representation, even though extrinsic to the product, was in fact true? (Cf. Gov't Br. p. 15).<sup>13</sup>

**C. THE LEGAL CONCLUSION ON WHICH THE ORDER RESTS CANNOT BE SUSTAINED AS AN EXERCISE OF THE COMMISSION'S DISCRETION.**

The Government contends that the Commission's legal conclusion and its order based on that rule of law must be

<sup>13</sup> The Government's further strained analogy to an advertisement falsely representing that a seller contributes one-half of his profits to charity or that he is impoverished (Gov't Br. p. 15 n. 4) does not advance its case. If the extrinsic fact represented were true, that the seller's profits went to charity or that he was impoverished, it would make no difference if he were portrayed against a painted background of a church, of a school, or even of the county poorhouse.

A truly relevant analogy is that offered by the court below. In discussing the Commission's then asserted contention that "in a 'genuine' test the viewer has more 'proof' than the advertiser's 'word,'" the court pointed out that prerecording of a television commercial has never been challenged by the Commission. (R. 137). Yet in prerecording a portrayed test, there is an equal possible inference by the viewer that the test not only was once carried out but can be reproduced. As to this, the viewer is equally dependent upon the advertiser's word. If the test is not a true test because it cannot be reproduced, the claim it advances about what the product can do is false and misleading. But the Commission has never suggested that prerecording of a commercial on television tape constitutes an unfair or deceptive practice under the Act.

sustained as a matter confided to agency discretion subject only to review for abuse of discretion. This argument must fail for at least four compelling reasons.

First, while we do not contend that the content of the phrase "unfair or deceptive acts or practices" is static, the Commission is not left at large to rewrite the statute. It was not empowered to determine that an advertisement that makes completely truthful claims about the advertised product becomes false and misleading because of the method by which those claims are communicated. Inescapably, the entire argument about administrative discretion rests on the premised prior legal conclusion that material factual deception exists in an advertisement making a truthful claim by a faithful portrayal of a valid test or experiment solely because of the undisclosed use of a photographic prop or mock-up in the photography.

The argument is thus completely circular. The Commission does not independently sustain its order as being a matter of exclusive agency competence by an argument that necessarily assumes that it is right in the admittedly nondiscretionary conclusion of law on which the order is based—that the undisclosed use of a photographic prop or mock-up in an advertisement is deceptive *per se*.<sup>14</sup>

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<sup>14</sup> Even a casual reading of the relevant part of the Government's brief (pp. 16-21) discloses the circular fallacy. It first assumes that the use of a photographic prop in portraying a valid experiment is *per se* a "misrepresentation" and a "material" misrepresentation. (P. 16). From this it proceeds to the argument that the Commission, and not the court, is entitled to weigh the harms and needs of what it erroneously calls a "rigged experiment" to determine whether the assumed "material misrepresentation" is ever to be tolerated. Of course, the court below did not purport to weigh the harms and needs of "a rigged experiment" but discussed a portrayal "illustrating faithfully a test which has been actually performed" (R. 136), and it held not that "material misrepresentations" were to be tolerated but that there was no material misrepresentation in such a portrayal.

By the same token the argument that the use of a photographic prop or mock-up in making completely truthful claims is unfair to honest competitors (Gov't Br. p. 20) is patently circular. Where no deception exists, no competitor is unfairly injured. Nor is any advertiser given an unfair competitive advantage.



SECOND, whatever may be the ambit of agency discretion, it must be exercised on some facts of record. There were none at all in this proceeding as to any of the assumptions with respect to the use of props or mock-up to make *truthful* product claims, which the Commission now advances to support its legal position. As noted, *supra* pp. 6-7, the novel legal theory on which this order rests was imported into the proceeding by a hypothetical "even if" assumption on the part of the Commission when it reversed the hearing examiner's dismissal of the complaint. (R. 14).<sup>15</sup> Administrative action cannot be taken *in vacuo*, and agency interpretations of law cannot rest on adjectival characterization of a method of presentation without regard to the truth of the advertisement.

THIRD, the arguments advanced are unfounded. The claim for recognition of the Commission's discretion is predicated on the assertion that the Commission can weigh "the harms of rigged experimental proofs" against the need for them. (Gov't Br. p. 17). Obviously, the premise is fallacious if not nonsensical.<sup>16</sup> The experiment or test, faithfully portrayed by a studio photograph in which props or mock-ups were used, is not rigged.<sup>17</sup>

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<sup>15</sup> Parts II and IV of the order (R. 94, 95) prohibit the making of any false claim as to the qualities or merits of any shaving cream, and would ban the challenged advertisements that were actually involved. Parts I and III, which cover *all* products and proscribe the use of props or mock-ups even where the claims are completely true, rest entirely on the hypothetical situation posited after the record was closed and the Commission was reviewing the hearing examiner's decision.

<sup>16</sup> If the test or experiment were rigged, the claim made by showing it would not be supported, and the advertisement would be false and misleading under the Act.

<sup>17</sup> On the Commission's assumptions that in an advertisement making completely truthful claims the use of a photographic prop or mock-up would be material to the viewer, the observations of Mr. Justice Frankfurter during the course of oral argument in *NLRB v. Pittsburgh Steamship Co.*, 340 U. S. 498 (1951), are relevant. There this Court sustained a judicial reversal of an order of the Board for lack of substantial evidence of record. Mr. Justice Frankfurter observed: "[W]ith all due regard to



Another exposure of the same fallacy in the Commission's approach is seen in the suggestion (Gov't Br. p. 18) that the order is carefully drawn "so as to apply only to *deception* in the presentation of a 'test, experiment or demonstration that . . . is represented to the public as *actual* proof of a *claim* made for the product'." (Emphasis added). Once again, this assumes the conclusion: The Commission holds that the hypothetical situation of a valid test making a true product claim, faithfully photographed with the use of a prop or mock-up, is as a matter of law a material deception. Moreover, the fact is that what is represented (what the viewer is given to understand by the picture of the test or experiment portrayed) is actual proof of the "claim made for the product."

On the other side of the coin the Government concedes that

"the technical limitations of television may prevent a sponsor from showing on television an experiment which it can perform and has performed elsewhere." (Gov't Br. p. 18).

It insists, however, that where this is true—as, for example, where the camera cannot faithfully reproduce what was done without the employment of a photographic prop, or there are physical difficulties, as in the nylon rope example, in photographing the actual test in a studio—the undisclosed use of the photographic prop or mock-up can be proscribed in order to require that the advertiser let "the viewer know the truth." (Gov't Br. p. 19). What truth? The product claim made is true. The test is valid and it can be performed and has been performed elsewhere. The

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the expertise and expertness of the National Labor Relations Board, judges also have a good deal of experience in the world with these matters. If I were a circuit judge and if I were told to base my judgment on substantial evidence on the record considered as a whole, I do not think I would be free to say this looks to me like an utter cock-and-bull story but those fellows, Paul Herzog and the others, know human nature and I do not." Jaffe, *Judicial Review: Question of Fact*, 69 Harv. L. Rev. 1020, 1039 (1956).

visual representation of the test is a faithful portrayal of what was performed.

FOURTH, the Government in its brief before this Court dilates on behalf of the Commission on what it terms "the harms of sham 'proofs.'" (Gov't Br. p. 19). Once again, this Court will appreciate that there is nothing in the record to support any of the suggestions advanced.<sup>18</sup> The arguments are contrived, and they have validity only if, again, the initial legal premise of a material misrepresentation is conceded. That premise is not established by characterizing a valid test actually performed and faithfully portrayed as a "rigged test," or "rigged experiments and tests" or as "a fake experiment." (Gov't Br. pp. 20-21). The cardinal point is that the test or experiment portrayed is *not* a rigged or a faked experiment.

The Government goes so far in this part of its brief as to say that unless its order stands the full potentiality of television will not be realized. It says "the revolutionary capability of television—the capacity to demonstrate the truth of a claim to prospective buyers—is nullified by the decision below." (Gov't Br. p. 20). This extraordinary result of permitting photographic props or mock-ups to be used to compensate for vagaries of the camera or for the sake of convenience apparently is thought to follow from the fact that viewers will not know whom to trust and will therefore trust no television advertiser unless they can be sure that every television depiction of a test or experiment was actually photographed in the laboratory. The fact is, of course, that viewers will have no reason to be and will not be disillusioned by television depictions if they know that every portrayal they see of a test or experiment

<sup>18</sup> The Government's words on this score (Gov't Br. pp. 19-21), which in their portentous gravity seem altogether out of proportion to what is actually in issue, all deal with television and the supposed need to protect television viewers and the integrity of television as an advertising medium. The Commission's order is not so limited. The order proscribes the undisclosed use of photographic props or mock-ups in portrayals presented in printed advertisements in newspapers, magazines and all other printed media, as well as in photographs offered in catalogues, advertising displays shipped in commerce and all similar advertising materials.

making a claim for a product is of a test that has been and can be performed and the product they buy has exactly the qualities claimed for it, as proved by the test or experiment they have seen faithfully depicted.<sup>19</sup>

The Commission's administrative discretion does not extend to taking a hypothetical situation, as to which there is no evidence in the record before it, and using it to evolve a *per se* rule of law proscribing the undisclosed use of mock-ups or props in faithfully portraying a valid experiment that makes a completely truthful claim about a product.

II. THE AMBIGUITIES IN THE COMMISSION'S ORDER ARE AN INEVITABLE PRODUCT OF THE IRRATIONALITY OF THE LEGAL PROPOSITION ON WHICH THE ORDER IS BASED AND THUS DISCLOSE THE COMMISSION'S BASIC ERROR, AND THEY ARE IN THEMSELVES A GROUND FOR SETTING THE ORDER ASIDE.

In this Court the Government endeavors in the final part of its brief to draw a red herring across the entire legal issue as to whether an advertisement in which a valid test or experiment is faithfully portrayed with the undisclosed use of a mock-up or prop and which makes completely truthful product claims can be held deceptive under Section 5 of the Federal Trade Commission Act. (Gov't Br. pp. 21-25). The Government states erroneously that the court below rested its decision "in large part upon the problems of compliance, administration and enforcement" to which that part of the Commission's order relating to photographic props and mock-ups gives rise. (*Id.* p. 21). That statement as to the basis for the lower court's decision is unfounded.

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<sup>19</sup> Once again it must be noted that the continued insistence that the Court is here concerned with "factual representations" that are "false" (Gov't Br. pp. 9, 10) is a misstatement because every factual representation made by an advertisement faithfully depicting what the product can do is completely true.

This is not to say, however, that if the court below had reached the question of the many ambiguities in Parts I and III of the order (R. 93-94), it would not have held that the order must be set aside because of those ambiguities.

In *FTC v. Henry Brock & Co.*, 368 U. S. 360, 367-68 (1962), this Court observed that:

"The severity of possible penalties prescribed by the amendments for violation of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application." (Emphasis added).

For an advertising agency such as this respondent the coverage of the mock-up parts of the Commission's order, reaching the advertisement (by any pictorial means, not just by television) of "any product in commerce," emphasizes further the necessity for clarity. In its impact on an advertising agency the order would reach *every product* concerning which the agency prepared advertisements for any of its clients. Under Section 5(1) of the Act, 15 U. S. C. § 45(1), violation of the order can result in a civil penalty action in which the advertising agency

"... shall forfeit and pay to the United States a civil penalty of not more than \$5,000 for *each violation*. . . . Each separate violation . . . shall be a separate offense, except that in the case of a violation through *continuing failure or neglect* to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a *separate offense*."<sup>20</sup> (Emphasis added).

<sup>20</sup> A single television commercial that falls short of compliance, broadcast 85 nights on a national network of 50 cities, might conceivably, if the penalty action could be based on the second sentence of § 5(1), yield a daily penalty of \$425,000 and accumulate an annual penalty of \$21,125,000. How long the Commission might

In its brief the Government concedes the ambiguity of the order when it says that "admittedly, there will be a number of cases in which the line is narrow between a representation that experimental proof is being furnished and a mere portrayal of a product's characteristics." (Gov't Br. p. 22). It seeks nevertheless to sustain the order despite its patent ambiguity on grounds that we shall discuss in a moment. The critical point, however, is that, having acknowledged that there is a "narrow line" between what the order proscribes and what it permits, the Government does not address itself to the fatal defect in the order exposed by the inability of the Court of Appeals to see any line at all, except one drawn arbitrarily by fiat.

In its opinion the court below pointed to the obvious ambiguities in the sections of the Commission order dealing with the use of props and mock-ups. (R. 134-36). But it was not because of those ambiguities themselves that it set the Commission's order aside. It set the order aside because it could not accept, as it had not been able to accept on the first appeal, the Commission's conclusion that as a matter of law the undisclosed use of props or mock-ups in an advertisement making completely truthful claims was a deceptive practice under the statute.

The ambiguities were recited by the court by way of demonstrating that there was no logic or sense in the assumptions and distinctions the Commission advanced in attempting to draw a line between the permitted "casual or incidental" use of mock-ups to "state and portray a product claim" (Gov't Br. p. 18) and the prohibited use of props or mock-ups in portraying a valid test, experiment or demonstration. The court tested the various attempted formulations of the Commission against the order and

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wait before asking that suit be instituted is not controlled by the statute. There is the further possibility that if, as the Government here suggests, there were some type of consultation with the Commission staff, and failure to follow the informal opinions given, use of the penalty concept of "continuing failure or neglect to obey" would be sought.

found that the ambiguities in the order laid bare the defects of the Commission's legal position.

As one example, the court below pointed to the illogic of the Commission in attempting to distinguish the case of a mock-up of advertised ice cream that is merely pictured on the television screen. This would not, the Commission has said authoritatively, be within the legal rule it advanced. (R. 134). The court concluded by saying that the nub of the case

"is either that Colgate [in the portrayal of the sand-paper test] impliedly says its depiction is real and the ice cream manufacturer does not, or that the misrepresentation is material in the case of the sand-paper, and harmless in the case of the ice cream. The Commission says the ice cream case is different, but, with all deference, we find its opinion, while long on generalities, short on analysis." (R. 137-38).

The Government, as we have said, makes no attempt to meet this part of the opinion of the court below.

A supposed legal principle is not a valid principle if it includes some situations and excludes others on some concept of inclusion or exclusion that cannot be articulated in terms of reason or logic. A theory by which the use of a photographic prop or mock-up in an advertisement showing a faithful portrayal of a valid test or experiment impliedly makes a false representation of fact that is material and deceptive to the viewer—but that stops short of including all other uses of photographic props or mock-ups from which the identical representation could equally be inferred—is neither logical nor a proper interpretation of Section 5. This was a basis for the Court of Appeals' reversal of the Commission on its legal theory, and its reasoning in this respect is untouched by anything the Government has said in this Court.

Even so, the Government's attempts to defend the ambiguities in the order that it concedes to exist are unsuc-



cessful. One such attempt is its statement that the respondents can be certain of compliance, "simply by avoiding any suggestion that they are furnishing experimental proof of their claims when they are not." (Gov't Br. p. 24). This is no answer at all. It means that to avoid the possibility of violating the order respondents hereafter must forgo—in television advertising, in printed advertisements and in catalogues—all photographic portrayals with undisclosed mock-ups or props of anything that someone might think was properly to be considered a test, experiment or demonstration even though it made a completely truthful claim for a product.

Further, the Government suggests that the respondents can come to the Commission and get definite advice from it as to whether their future advertisements will or will not conform to this ambiguous order.<sup>21</sup> This attempted answer to the patent ambiguity of the order cannot be accepted. Advertising is both dynamic and complicated. To suggest that timely consideration of all television commercials and all printed advertising materials could be obtained from the Commission is far-fetched indeed. Months could pass before a Commission decision was reached. Moreover, the suggestion that the agency could effectively undertake this burden is wholly unrealistic

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<sup>21</sup> In support the Government cites *Vanity Fair Paper Mills, Inc. v. FTC*, 311 F.2d 480, 488 (2d Cir. 1962). (Gov't Br. p. 24). That case involved advertising allowances that violated the Robinson-Patman Act. Commissioner Elman dissented on the ground that an order should not be "in broad, indefinite, and ambiguous terms." 311 F.2d at 487. The Court of Appeals in fact modified the Commission order. The court did advert in the passage quoted by the Government to the filing of a compliance report to indicate the changes the respondent was making in its practices to make them comply. In the circumstances this need have been only a single, simple statement. It is absurd to suggest that a compliance report under the present order could conceivably embrace all proposed future advertising lay-outs and television tapes that include portrayals of experiments or tests for every product dealt with by an advertising agency for each of its clients.

in the light of the commonly recognized delays incurred in its normal enforcement activities.<sup>22</sup>

But the vice of the suggestion bites more deeply. The Act provides that orders are to be enforced either by a contempt proceeding or by a civil penalty suit. That is the predicate of the *Broch* decision. The statute nowhere contemplates a virtual licensing system whereby through the entry of sweeping orders of manifest ambiguity the Commission is authorized to act as a clearing house for advertising copy and television commercials.

The conceded ambiguities in the Commission's order are not cured by either of the Government's suggestions. Nor could they be cured by a direction to rewrite the order to clarify it but with the legal theory on which it rests retained. The ambiguities derive from the theory and are inescapable in any order premised upon it.

### III. THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED OR THE WRIT DISMISSED AS IMPROVIDENTLY GRANTED FOR THE INDEPENDENT REASON THAT THE COMMISSION'S ORDER ON REMAND FLOUTED THE ORIGINAL MANDATE OF THE COURT OF APPEALS.

In our brief in opposition we said that, if the petition for certiorari were granted, we would assert as an independent ground for sustaining the decision of the Court of Appeals the controlling point that the Commission on remand from the Court of Appeals' first decision did not conform its order to the mandate of the court but instead

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<sup>22</sup> The rule referred to by the Government plainly requires Commission action rather than mere staff comment. Parts I and III of the order, the portions here under consideration, apply to advertisements for "all products" sold by the advertiser and "all products" dealt with by the advertising agency. Any application to resolve the admitted ambiguities in the order must "include full and complete information." In the light of the confusion running throughout the Commission's three opinions as to what it would consider a "genuine test, experiment or demonstration," as distinguished from a "casual or incidental" display of the product, the impracticability of the Government's ultimate defense of the Commission legal theory and ambiguous order needs little elaboration.

plainly flouted the mandate. For this reason the judgment should be affirmed or the writ dismissed as improvidently granted because, upon analysis, the issue is compliance with the mandate, an issue not worth this Court's attention. The Government has not adverted to the point in its brief.

That the Court of Appeals' mandate was flouted is clear to anyone who reads the original order of the Commission, the opinion and judgment of the Court of Appeals setting that order aside and the subsequent opinions and final order of the Commission. (*Cf.* R. 90). In brief, although directed to proceed "in accordance with" an opinion that flatly rejected the legal proposition that the undisclosed use of a mock-up or prop made unlawful an advertisement making a truthful claim for a product and that called for the preparation of "an entirely new" order, the Commission adhered to the proposition of law and merely revised its order to cure what it then professed to see as some original lack of clarity in it.

The Court of Appeals knew that its mandate had been flouted. It noted that the Commission had said on remand that "various suggestions" of the court had been accepted in substantial part. The court then stated that in its original opinion it had "reached a number of conclusions not labeled suggestions which the Commission was not free to disregard under the mandate." To this sentence there was cited Section 5(i) of the Federal Trade Commission Act, the terms of which we shall discuss below. (R. 132).

Although the court indulgently undertook to discuss the merits of the Commission's position as restated, it made clear in disposing of the case that it regarded the restated position as contrary to its original mandate. In disposing of the case, the court said that

"we instruct the Commission as we thought we had directed it before, to enter an order confined to the facts of this case, where respondents used a mock-up to demonstrate something which in fact could not be accomplished." (R. 139).

In any event, this Court, which has ultimate responsibility for the effective administration of justice in the federal courts, is not bound by the Court of Appeals' act of grace in indulging, in its discussion, the obduracy of the

Commission. It is vital to the administration of justice that inferior tribunals obey the decisions of the courts empowered to review their judgments. The rule is clear as to inferior courts. *E. g.*, *United States v. Haley*, 371 U. S. 18 (1962); *Sibbald v. United States*, 12 Pet. 488, 492 (1838). It holds for administrative agencies as well.<sup>23</sup> *Morand Bros. Beverage Co. v. NLRB*, 204 F. 2d 529 (7th Cir. 1953), cert. denied, 346 U. S. 909, (1953); cf. *The Stacey Mfg. Co. v. Commissioner*, 237 F. 2d 605 (6th Cir. 1956). The principle should be enforced here.

If the Federal Trade Commission wished to press for its interpretation of Section 5 of the Federal Trade Commission Act after the adverse decision of the Court of Appeals, its proper course was to ask this Court for a writ of certiorari to review that decision.<sup>24</sup> The Commission did not do this. Instead, it purported to accept the remand of the case to it by the Court of Appeals and embellished its legal

<sup>23</sup> *FCC v. Pottsville Broadcasting Co.*, 309 U. S. 134 (1940), is by no means to the contrary. The Court there spelled out the difference, in cases involving the administrative grant of a franchise, between the relationship of court to court and court to agency, *id.* at 141-45, principally that a reviewing court may not grant a franchise and is not always privileged to dictate the proceedings to be followed by an agency on remand in the same way and in the same detail as an appellate court may specify the judgment to be entered or the proceedings to be followed by a trial court on remand. But the Court also declared that "on review the court may . . . correct errors of law and on remand the [agency] is bound to act upon the correction." *Id.* at 145. That is what the reviewing court did in its first opinion and judgment here, and the agency did not act upon the correction but perpetuated its legal error. Moreover, the present proceeding does not concern the grant of a franchise, and the Federal Trade Commission Act affords the reviewing court the power directly to modify a Commission order. *Vanity Fair Paper Mills, Inc. v. FTC*, 311 F.2d 480 (2d Cir. 1962); *Bankers Security Corp. v. FTC*, 297 F.2d 403 (3d Cir. 1961).

<sup>24</sup> It could also have applied for a rehearing. If it had, every restatement in its second opinion could have appeared in its brief.

Following the decision in *Sunshine Biscuits, Inc. v. FTC*, 306 F.2d 48 (7th Cir. 1962), setting aside a Commission cease and desist order because of a disagreement with it concerning the scope of the meeting competition defense under the Robinson-Patman Act, the Commission issued a public announcement that it would not file a petition for certiorari even though it pointed to a conflict in the circuits on the question and said its own view of the law—opposed to that of the court of appeals—had not changed. Commissioner Elman issued a dissenting statement. 5 CCH Trade Reg. Rep. ¶ 50,166.

position without altering it and revised its order without basically altering it in the almost certain knowledge that its disposition would not be accepted as substantial compliance with the mandate, but that the matter would be presented again to the Court of Appeals. (Cf. R. 48-49).

This extraordinary procedure is of a piece with the Commission's manifested determination to make of this "trivial" case a vehicle for extending its control over advertising by reaching out to decide a question not posed on the record before it and entering, on unsupported assumptions that are applicable, if to anything at all, only to television, an order governing all pictorial advertisements. This Court should not countenance the procedure the Commission has followed in attempting to create the legal rule on which its order is based.

Indeed, Congress has specifically prescribed that such a procedure not be followed. Section 5(i) of the Federal Trade Commission Act provides that, after a court of appeals has set aside an order of the Commission and the time for filing a petition for certiorari has passed without a petition being filed,

*"then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected."* Federal Trade Commission Act § 5(i), 52 Stat. 114, as amended, 15 U. S. C. § 45(i). (Emphasis added).

Thus the statute, embodying the principle of sound judicial administration that we have mentioned, contemplates only an order on remand that complies with a court of appeals' mandate, not an order such as was entered by the Commission in this case, designed to raise again, with what the agency may hope is a somewhat more favorable focus, the legal question disposed of by the court of appeals.

**CONCLUSION**

The judgment of the Court of Appeals should be affirmed or the writ of certiorari dismissed as improvidently granted.

Respectfully submitted,

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**COVINGTON & BURLING**

**NOVEMBER 1964**



# **In the Supreme Court of the United States**

**OCTOBER TERM, 1964**

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**No. 62**

**FEDERAL TRADE COMMISSION, PETITIONER**

**v.**

**COLGATE-PALMOLIVE COMPANY AND TED BATES &  
COMPANY, INC.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT**

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**REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION**

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The Commission is filing this brief in reply to the contentions of respondents that the writ of certiorari should be dismissed or the decision below affirmed on the ground that the Commission failed to comply with, or seek review of, the first decision of the court of appeals.

1. On its original review, the First Circuit had before it an order which might be read literally to prohibit the respondents from using any substitute or mock-up in any television commercial. It forbade them, "in describing \* \* \* the qualities or merits of any product"—which is what every commercial does—from representing even by implication that pictures

shown were genuine depictions of the product when they were not (R. 7-8). In seeking review of this order, both respondents argued to the court of appeals that the order was in no sense limited to representations involving a test or experiment.<sup>1</sup> They voiced their serious concern that the Commission's order would forbid almost every use of mock-ups or substitutes. After some initial hesitation the Court concluded that (R. 40) "[o]n consideration we agree with respondents that the order may be read as forbidding such conduct." "To be doubly sure" that its "understanding of the Commission's position was correct," the court asked Commission counsel whether the order would forbid use of an artificial substance in a commercial showing a prominent person enjoying iced tea; counsel answered that it would be forbidden, thus confirming the court's apprehensions as to the intended scope of the order (R. 40).

With this question as to interpretation resolved, the First Circuit set aside the order, holding that the devices necessary for conveying accurate product claims are generally matters of indifference to television viewers: "What the viewers are interested in, and moved by, is what they see not by the means" (R.

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<sup>1</sup> Brief of Ted Bates, pp. 33, 35; Reply Brief of Colgate-Palmolive, p. 18. Respondent Bates, for example, stated (at p. 35): "What was actually involved in this case was a particular *type* of visual demonstration—what is described as a sandpaper 'test.' Clearly, an *experiment* or *test* such as this is wholly unrelated, for example, to simple depictions of a product—in which photographic techniques must often be used to achieve accuracy—or to mere dramatic scenes, in which the use of actors and props is reasonable and necessary."

40). It is important to note, however, what the First Circuit did *not* consider and did *not* hold. The court's attention was not directed to the question of the materiality of a misrepresentation that certain product claims have been verified by some form of objective proof—for example, by a visual test or the certification of an independent testing agency. Nothing in the court's opinion suggested that such misrepresentations are never in themselves deceptive trade practices. And the court plainly did not overturn the Commission's finding that the respondents had falsely represented that they were furnishing visual, experimental proof of the moisturizing capacity of Rapid Shave.

The court of appeals remanded the case to the Commission for further proceedings in accordance with its opinion, i.e., to prepare a new order consistent with the opinion (R. 33, 42-43). This mandate, which required only that the Commission respect the grounds of the court's decision, left it free to discharge what this Court has held to be the duty of an administrative agency on remand: "On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. [Citation omitted.] But an administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145. The Commission was bound to respect the rules

of law laid down by the court on review but, equally, "[a]fter the remand was made \* \* \*, the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress." *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 201.

We believe that the Commission's actions on remand were fully consistent with the court's opinion.<sup>2</sup> The Commission's second decision made clear that it was relying upon a different and far more limited theory than the general prohibition of mock-ups rejected by the court of appeals. Its restated position is simply that one of the factors material to purchasers is the basis they have for believing the truth of a seller's claim and that, therefore, any form of false proof is materially deceptive whether or not it involves the use of mock-ups (cf. *Hutchinson Chem. Corp.*, 55 F.T.C. 1942)—indeed, whether it involves an experiment, a testing agency, or any other form of proof. As we have indicated above, this ground of decision was not discussed or considered by the court of appeals which had before it an order apparently directed at the use of mock-ups, rather than false proofs. The Commission's new order is explicit—that the use of mock-ups is not forbidden except insofar as mock-ups are the means of making a

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<sup>2</sup> The question of compliance with the lower court's mandate can be resolved by this Court without need of a remand to the First Circuit, which did not rule on the question and whose decision would not, in any event, be binding upon this Court. See *National Labor Relations Board v. Donnelly Garment Co.*, 330 U.S. 219, 227; *Federal Communications Commission v. Pottsville Broadcasting Company*, 309 U.S. 134, 141.

separate and distinct misrepresentation of experimental proof."

2. We submit, however, that it was not necessary for the court of appeals to resolve the question of consistency of the Commission's second decision with the court's original opinion; and it is not necessary for this Court to undertake that task. When the respondents sought review of the Commission's actions on remand, they pressed upon the First Circuit their contention that the court should decide no more than that the Commission's decision and order were inconsistent with the court's first opinion. The court refused to adopt this approach and stated explicitly that it would re-examine the Commission's position "on the merits rather than from the limited standpoint of whether it comports with our previous opinion" (R. 133). The respondents now urge this Court to undertake review from that "limited standpoint" which the First Circuit declined to adopt, contending, in effect, that the court of appeals abused its discretion in bypassing the question of the Commission's compliance with the mandate. We submit that the court below acted not only within its discretion but also with the wisest regard for the necessity of flexibility in judicial review of administrative proceedings.

The Commission's actions on remand represented a respectful and procedurally sound attempt to obtain a clearer ruling from the court of appeals by clarifying the Commission's own decision and order.

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\* The only reference to mock-ups in the Commission's order on remand is by way of limitation of the scope of its prohibition of sham proofs.

The court's original opinion was, at best, extremely ambiguous as to the propriety of a prohibition of sham experiments represented as proof of a seller's claims. To obtain resolution of this ambiguity—to discover precisely what is the scope of its administrative authority—the Commission undertook to re-draft its order so as to present its position to the reviewing court squarely and precisely. This task required a formal opinion by the agency itself; it could not properly be undertaken by counsel on petition for rehearing. *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 94. The Commission's only alternatives—to authorize a trade practice which it thought was unfair and to which the First Circuit<sup>9</sup> had not expressly directed itself or to seek Supreme Court review although its order was concededly unclear and the court of appeals had never been asked to review an order drawn precisely enough to bring the Commission's views into focus—were plainly less desirable and appropriate.

In the light of this background, the First Circuit's treatment of the question of compliance was sound. If the Commission had flouted or defied its mandate, the court would properly have set aside the Commission's order on that ground and refused to re-examine the Commission's position on its merits. Cf. *Carr v. Federal Trade Commission*, 302 F. 2d 688, 691-693 (C.A. 1). However, the mandate had not been exact or self-executing; its meaning had to be inferred from the language of the opinion as a whole and was a matter on which reasonable men could differ. The Commission's interpretation of the court's decision and



mandate was a reasonable one, and its actions on remand were taken in good faith for the sole and proper purpose of assuring that its position would be fully understood, carefully considered, and directly approved or disapproved by the reviewing court. In this context, no rule of law required the court to disregard the ultimate merits of the Commission's restated position and limit review to the question of consistency of that position with the implications of the court's original decision and order. It was free to cooperate with the agency's efforts to obtain a clear and final resolution of a question of administrative importance.

While an appellate tribunal usually will not reconsider its own rulings of law on a subsequent appeal in the same case (e.g., *Morand Bros. Beverage Co. v. Labor Board*, 204 F. 2d 529, 532 (C.A. 7)), this principle—the rule of “law of the case”—is not an inexorable command but “only a discretionary rule of practice.” *United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186, 199; see Note, 65 Harv. L. Rev. 818, 822 (1952). Especially in the case of administrative orders, judicial review would be deprived of essential flexibility if the rule of “law of the case” were applied mechanically, without regard either to the good faith and reasonableness of the agency's actions on remand or to the benefits of reconsideration in the light of a clarified administrative position. On all the facts of this case, the court of appeals chose to review the agency's new order on its merits, rather than from the narrow and sterile viewpoint of consistency with the implications

of its earlier opinion, which had been written without the benefit of either a sufficiently clear statement of the Commission's position or a precisely delimited order. This choice by the court of appeals was an eminently practical one, promoting the fair and orderly review of administrative decisions. It is not without precedent in the review of Commission decisions. See *A. E. Staley Mfg. Co. v. Federal Trade Comm'n*, 144 F. 2d 221, 222 (C.A. 7), reversed on the merits, 324 U.S. 746. And it very plainly involves no violation of any substantive or procedural rights of the respondents. See *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 200-201; *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145-146.

Respectfully submitted.

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